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# **DECISIONS OF THE WAR DEPARTMENT BOARD OF CONTRACT ADJUSTMENT**

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**VOLUME VI**

**1920**



**WASHINGTON  
GOVERNMENT PRINTING OFFICE  
1921**

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JUNE 5, 1920.

Case No. 1563.

*In re* CLAIM OF INTERNATIONAL HARVESTER CO.

1. **CLAIM AND DECISION.**—This claim, under the act of March 2, 1919, was decided adversely to claimant in a decision of this Board rendered April 1, 1920. Claimant requested a rehearing, which was held on May 21, 1920, but no additional testimony or evidence was introduced. Held, on careful consideration of the former decision, that claimant is not entitled to relief and that the former decision should stand without change. (For former decision see vol. IV, page 794.)

Mr. Williams writing the opinion of the Board.

**DECISION.**

1. This case comes up on a petition for rehearing filed by claimant subsequent to a decision of this Board rendered on April 1, 1920. Upon the rehearing, which was held on May 21, 1920, the petitioner saw fit to introduce no additional testimony or evidence, but relied exclusively upon an argument by counsel of alleged errors in the former decision and a discussion of the evidence upon which that decision was based. The point for decision was, in effect, whether or not the Government agreed with the petitioner to add on to the price of \$1,875 for each of one hundred and twenty-five 2-ton trucks an amount sufficient to absorb the war tax upon their sale, and counsel for petitioner was given permission to submit evidence that might throw light upon this question and was asked, if petitioner was able or saw fit, to submit, as bearing upon this question, the cost figures upon which the petitioner based the price of \$1,875 per truck in petitioner's offer which preceded the agreement for the purchase of the trucks. Petitioner submitted the evidence of Mr. E. C. Duffey, who was the salesman of the petitioner company who negotiated the sale of the trucks to the Government, and stated that—

“It is impossible to furnish the costs of the manufacture of these trucks.”

2. This Board has given careful consideration to the former decision rendered herein, to the petition for rehearing and briefs of counsel, and additional affidavit of Mr. Duffey, and is clearly of the opinion that the former decision rendered in this case on April 1, 1920, is correct and just and should stand without change.

Col. Delafield and Maj. Farr concurring.

JUNE 5, 1920.

**Case No. 1881.**

*In re* **CLAIM OF SOUTHERN AIRCRAFT CO.**

1. **REQUEST TO HOLD WORKMEN.**—There is no merit in a separate claim for pay-roll expense of employees alleged to have been held at the request of the Government for the performance of a future contract where such contract was subsequently awarded, especially since the contract has been settled and the Government released from all claims thereunder.
2. **JURISDICTION.**—Where a validly executed contract has been fully performed, the Secretary of War has no jurisdiction of a claim for reimbursement of loss sustained by reason of alleged unwarranted rejection of articles by Government inspectors.
3. **CLAIM AND DECISION.**—This claim is made up of three items totaling \$19,338.38 presented under the act of March 2, 1919, and based upon implied agreements. Held, claimant is not entitled to relief.

Lieut. Col. Junkin writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This is a class B claim aggregating \$19,338.38, and came before this Board by reason of its original jurisdiction in such cases. Hearings in this case were had before this Board on February 24, 1920, and April 2, 1920.

2. The claim is made up of three items, each controlled by a different set of facts and conditions.

Item 1 consists of 40 per cent of the cost of the pay roll of men held at the plant of the claimant from the week ending August 29, 1918, to the week ending December 5, 1918. These men, the claimant alleges, were held at its plant upon the request of Government officials. The remainder of the expenses of such pay roll, or 60 per cent, was borne by the claimant. Referring to this item. the claimant, in its petition, says:

“This claim, as itemized below, is based upon workmen held at our plant at the request of officials of the Bureau of Aircraft Production while waiting for new Government contracts for propellers. We completed all glueing on first contracts on August 26, 1918, and final shipments were made on September 12, 1918. After finishing these first contracts, a majority of our workmen who were doing the work were held and placed in our furniture department on work that did not otherwise cost us over 60 per cent of the amount which we were paying these special workmen. We here enumerate the



amounts paid these special workmen, and also itemize the 40 per cent increase in wages paid to these workmen over our usual furniture department workmen:

Pay roll ending—

Aug. 29, \$1,315.75 minus 60 per cent.....	\$526.30
Sept. 12, \$1,137.95 minus 60 per cent.....	455.18
Sept. 26, \$664.15 minus 60 per cent.....	265.66
Oct. 12, \$566.75 minus 60 per cent.....	226.70
Oct. 26, \$552.10 minus 60 per cent.....	210.84
Nov. 7, \$530.20 minus 60 per cent.....	212.08
Nov. 21, \$355.40 minus 60 per cent.....	140.56
Dec. 5, \$433.65 minus 60 per cent.....	175.08

Total ..... 2,212.38

As to the alleged instructions given by Government officers to the claimant to hold these men at its factory, and upon which instructions this item is based, there is a direct conflict in the evidence before this Board. At the hearings held by this Board Mr. John H. Shaw and Mr. J. E. Kirkman, representatives of the claimant, testified positively that Capt. Ryerson, of the Bureau of Aircraft Production, instructed them to hold their factory force intact in order to be ready to take care of future contracts to be issued them, whereas Capt. Ryerson, who appeared as a witness for the Government, was equally positive in his testimony that no instructions whatsoever were given the claimant by him.

Item 2 is based upon the rejection of propellers by inspectors which the claimant alleges should have been accepted, and is as follows:

60 Gnome propellers, at \$75 each.....	\$4,500
125 Curtiss OX-5 propellers, at \$55 each.....	6,875
30 Penguin propellers, at \$45 each.....	1,350

Item 3 also covers cost resulting from the rejection of propellers by inspectors which claimant alleges should have been accepted, and is as follows:

5 OX-5 Curtiss propellers, tipped and finished, at \$80.....	\$400
28 OX-5 Curtiss propellers, in the white, at \$70.....	1,960
6 Gnome propellers, in the white, at \$90.....	540
6 Gnome propellers, tipped and finished, at \$102.....	612
17 Penguin propellers, in white, at \$52.....	884

Total ..... 4,396

As to the alleged unwarranted rejection of 125 Curtiss OX-5 propellers, which is included in item 2, and the alleged unwarranted rejection of 31 Curtiss OX-5 propellers included in item 3, the contract for the manufacture of these propellers was a formal contract, known as contract No. 2900, and is the only contract ever entered into between the claimant and the Government wherein the claimant's name, Southern Aircraft Co., appears. This formal contract was fully performed and claimant has received full payment thereon, amounting to \$40,637. As to the 60 Gnome propellers and the 30

Penguin propellers which are included in item 2 and the 12 Gnome propellers and 17 Penguin propellers in item 3, the contract for the manufacture of these propellers of both types was issued in the name of the Lang Propeller Co., which contracts were known as contracts Nos. 3092 and 3096. The work performed on these contracts by the claimant was so done as a subcontractor for the Lang Propeller Co.

3. The claimant received a contract dated September 16, 1918, calling for 1,000 Liberty propellers, which contract was issued to and settled in the name of the Giant Furniture Co., the Giant Furniture Co. being shown by the evidence before this Board to be one and the same as the claimant. This contract was suspended before completion by governmental order dated November 27, 1918. Thereupon a settlement agreement was entered into between the claimant and the Government covering this suspended contract whereby the Government was released from all obligations on the said suspended contract.

#### DECISION.

1. As to item 1, consisting of 40 per cent of the pay-roll expenses of men held at the plant of the claimant from the week ending August 29, 1918, to the week ending December 5, 1918, and amounting to \$2,212.38, the evidence before this Board as to the claimant receiving Government instructions to so hold these men in order to take care of future contracts, is in direct conflict. However, the claimant did receive a contract after the date when these instructions were alleged to have been given, namely, the contract dated September 16, 1918. In case these instructions were given the claimant, the subsequent issuance by the Government of the contract last mentioned, did, in the opinion of this Board, absolve the Government from any further obligation by reason of such instructions, if given. Just how many contracts would be issued for propellers was a matter not within the knowledge of either the Government or the claimant, and the act of the claimant in retaining these men in anticipation of receiving more contracts, was the mere assumption of a business risk. Further, it appears to this board that this item should be properly classed as expenses incurred under the contract issued and dated September 16, 1918, and suspended November 27, 1918, rather than as an item under a separate class B claim. The whole of this item was, as a matter of fact, originally included in the claim requesting settlement on the above-mentioned contract but was rejected in the final settlement by the Claims Board, Air Service, and the claimant on the final settlement of this contract did sign a release whereby it discharged the Government from all obligations, demands, or claims whatsoever that had arisen or might arise under this contract.

As to the costs sustained by the claimant by reason of the alleged unwarranted rejection of 158 Curtiss OX-5 propellers included under items 2 and 3, the contract for the manufacture of these propellers was a formal one which has been fully executed and for which the claimant has received full payment thereon. For these reasons, this Board has no jurisdiction to make a further adjustment of the costs sustained by reason of the alleged rejection of the 130 Curtiss OX-5 propellers, which number of propellers is the aggregate of the propellers of this type named in both items 2 and 3.

As to the alleged loss suffered by the claimant by reason of the alleged unwarranted rejection of the 72 Gnome and 47 Penguin propellers, which is the aggregate numbers of both types of these propellers included under items 2 and 3, the evidence before this Board does not show any contractual relation between the Government and the claimant for the manufacture of either of these types of propellers, but does show that the contracts for the manufacture of both types of these propellers was issued to the Lang Propeller Co. for whom the claimant worked as a subcontractor. Therefore it appears to this Board that any action looking to an adjustment of the losses sustained by the claimant by reason of the rejection of these propellers of both types should have been brought against the Lang Propeller Co. and not against the Government.

For the above reasons and upon the facts stated, this Board is of the opinion that no obligation rests upon the Government to reimburse the claimant for any of the items of this claim or any parts thereof, and that, therefore, the relief which the claimant seeks must be wholly denied.

#### DISPOSITION.

A final order of this Board denying relief will be entered accordingly.

Col. Delafield and Mr. Shaw concurring.

JUNE 5, 1920.

**Case No. 258.**

*In re* **CLAIM OF NATIONAL ENAMELING & STAMPING CO. (REHEARING).**

1. **CONTRACT SETTLEMENT—SUSPENSION.**—Where claimant had two contracts, for 20,000 each, to manufacture kettle inserts, and same were suspended; and at the time of suspension the Government contended that claimant's entire order only amounted to 22,000 kettle inserts, reimbursement to claimant for loss sustained will be limited to expenditures made prior to the receipt of notification of the Government's contention that only 22,000 kettle inserts were ordered: Except in so far as such expenditures and disbursements could not have been avoided by timely suspension of operations.
2. **CLAIM AND DECISION.**—This claim for \$6,723.18 arises under the act of March 2, 1919, and is presented upon the theory that claimant had contracts to manufacture 40,000 kettle inserts, and suffered loss by reason of suspension thereof. Held, claimant is entitled to relief.

Mr. Montgomery writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case is referred to this Board by order of the Assistant Secretary of War for further proceedings in accordance with the recommendation of the special advisers in their attached memorandum.

2. On the original hearing of this case before this Board an opinion was rendered under date of August 13, 1919, recommending that settlement be made upon the basis of an oral contract for 20,000 kettle inserts at \$3 each, "of which 17,500 have been accepted and paid for by the Government."

3. Thereafter further evidence was presented by affidavit and a rehearing was requested. The request was denied by this Board, and an appeal was taken to the Secretary of War.

4. The evidence shows that on August 26, 1918, Maj. W. J. Peck gave the claimant an oral order for 20,000 kettle inserts at a unit price of \$3 for 19,000 and a unit price of \$3.10 for the remaining 1,000, which were to be crated. On September 9, 1918, Capt. J. G.

Williams gave the claimant an order for 20,000 kettle inserts at a unit price of \$3.

5. The memorandum of the special advisers to the Secretary of War recommends that "such supplemental evidence should be obtained as will enable the Board to determine whether claimant's representative was justified in treating the oral order of September 9 as in addition to Maj. Peck's order of August 26, or whether, considering that no written order covering the authorization of August 26 had yet been issued, and that shipping instructions promised for August 30 were still lacking, claimant's representative should have considered the verbal order of Capt. Williams as merely a ratification of the previous verbal order issued by Maj. Peck."

6. A further hearing has been had, at which Maj. Peck and Mr. Rusche, the claimant's agent through whom the oral agreements were made, appeared and testified. Maj. Peck knew only of the order for 20,000 kettle inserts he had given. He was probably absent because of illness when the subsequent order was given by Capt. Williams and knew nothing about it.

7. Mr. Rusche testified that he had no reason to suppose that the order from Capt. Williams was merely a duplication of the order from Maj. Peck. Mr. Rusche testified further that he told Capt. Williams at the time that he had an order for 20,000, and Capt. Williams replied, "That don't make any difference; I have got a recommendation to buy 20,000 kettle inserts."

#### DECISION.

1. The apparent discrepancy between the testimony of Capt. Williams, given at the first hearing, and that of Mr. Rusche seems to be explained by assuming what appears from the evidence to be highly probable that Capt. Williams's request to "forget the 20,000 from Peck" was made at the conversation between them shortly before Rusche wrote his letter of September 28, and not at their interview of September 9.

2. It appears with reasonable certainty, and accordingly this Board decides, that the claimant's representative was justified in treating Capt. Williams's oral order of September 9 as in addition to Maj. Peck's order of August 26, and that, accordingly, settlement should be made upon the basis of orders for 40,000 kettle inserts. This is subject, however, to the limitation stated in the memorandum of the special advisers that no compensation should be allowed for any services or expenditures incurred after receipt by the claimant of the letter dated September 28, 1918, informing claimant of the Government's contention that only 22,000 kettle inserts had been

ordered, except in so far as such expenditures or disbursements could not have been avoided by timely suspension of operations.

DISPOSITION.

1. This Board will recall its certificate, Form C, dated August 13, 1919, and will make and transmit statements of the nature, terms, and conditions of the two agreements and a certificate C with each to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Price concurring.



JUNE 5, 1920.

Case No. 2464.

*In re* CLAIM OF SUSSFELD, LORSCH & CO.

1. **FINALITY OF INSPECTION.**—Where the contract provided that all materials furnished thereunder shall be subject to a rigid inspection and such as do not conform to the specifications shall be rejected, and that the decision of the Chief Signal Officer as to quality and quantity shall be final; in the absence of fraud such provision is binding on the claimant and this Board, and the action of the inspection officers is final and conclusive.
2. **CLAIM AND DECISION.**—Claim on formal contract under General Order 103 for \$5,320 for rejected barographs. Held, claimant not entitled to recover.

Mr. Henry writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order 103, War Department, 1918, and is for \$5,320, under the following circumstances:

2. On March 30, 1917, the claimant, a partnership, received purchase order No. 7012, for the following articles:

Item 148-A. 13 barographs, pocket, Richards, 20,000 feet, 30-second, 6-hour, at \$64 each-----	\$832
Item 148-B. 13 barographs, pocket, Richards, 20,000 feet, 30-second, 12-hour, at \$64 each-----	832
Item 1078. 9 thermo barographs, recording, 6-hour movement, graduation to be in feet, for altitudes up to 5,000 meters, thermometer from —20° to —40° C.; movement and case of aluminum; 1 front window; 4 hooks on top of case for suspending the instrument, same as per Signal Corps order 5504, dated Oct. 7, at \$95 each-----	855
Total-----	2, 519

3. This order for these materials, was incorporated into a formal contract dated March 30, 1917, and numbered 1235. On June 2, 1917, a second purchase order, No. 8102, was issued, which was amended on April 13, 1918, calling for the following articles:

Item 1. 70 barographs, pocket, 20,000 feet, 6-hour, Richards or equivalent, at \$64 each-----	\$4, 480
Item 2. 150 barographs, pocket, 5,000 meters, 6-hour, Richards or equivalent, at \$64 each-----	9, 600
Item 3. 20 barographs, pocket, 5,000 meters, 6-hour, Richards or equivalent, at \$53.25 each-----	1, 065
Total-----	15, 145

4. Formal contract covering the barographs contained in the second order was duly executed and numbered 1416.

5. Article III of both of said contracts contained the following provisions:

"All supplies and materials furnished, and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Chief Signal Officer, United States Army, as to quality and quantity, shall be final."

6. The said two contracts were suspended in December, 1918. Under the two suspended contracts there was a total of 275 instruments ordered, 181 of which were accepted by the Government, orders for 13 undelivered instruments were canceled by the claimant after the contracts were terminated, and 81 of the total number ordered were rejected on final inspection by duly authorized inspectors, whose inspection was accepted by the Chief Signal Officer, United States Army,

7. The claim is for the 81 rejected instruments upon the ground that they should have been accepted.

#### DECISION.

1. The claimant, under these contracts, agreed with the Government to furnish the instruments subject to a rigid inspection by an inspector appointed on the part of the Government, and such as did not conform to the specifications were to be rejected. The contract provided that the decision of the Chief Signal Officer, United States Army, as to quality and quantity should be final.

2. The meaning of the language of the contracts is plain and unmistakable, and the claimant, in the absence of fraud which it has neither alleged nor proven, is bound by the terms of the contract to abide by the decision of the Chief Signal Officer. That officer has made his decision, rejecting the instruments after proper inspection, and the same is final and conclusive and binding on the claimant.

3. The claim is therefore denied.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Air Service Claims Board for appropriate action.

Col. Delafield and Mr. Bowen concurring.

JUNE 5, 1920.

**Case No. 2082.**

*In re* **CLAIM OF HAAS BROS.**

- 1. INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.**—Where claimant is notified by a duly authorized agent of the Government that its bid for the manufacture of jam has been accepted, and claimant is directed to proceed with its manufacture without waiting for formal contract, and claimant is afterwards notified that no formal contract will issue, there is an obligation on the part of the Government to reimburse claimant for any loss it may have sustained on account of complying with directions to proceed.
- 2. CLAIM AND DECISION.**—Claim for \$1,054.67 under the act of March 2, 1919, for loss on jam. Held, an agreement within the meaning of said act.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, was originally filed in this case, but it should be considered as a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$19,459.10, which by subsequent negotiations has been reduced to the sum of \$1,054.67. The claim arises by reason of an agreement alleged to have been entered into between the claimant and the United States Government.

2. On or about October 1, 1918, claimant submitted proposals to the depot quartermaster at San Francisco, Calif., for furnishing to the United States Government some 3,350 cases of assorted jam. These proposals were approved by the depot quartermaster at San Francisco, Calif., and forwarded with a recommendation that they be accepted to the Quartermaster General at Washington.

3. On or about October 23, 1918, Mr. Abraham Meertief, vice president of claimant company, telephoned to Maj. H. K. Weidenfeld, zone supply officer at San Francisco, Calif., regarding the bids theretofore submitted by claimants, and the evidence discloses that at that time Maj. Weidenfeld told Mr. Meertief, vice president of claimant company:

“Your bids for jam accepted. Get them ready at once.”

4. Claimant company immediately ordered the jams called for in its bid, but no purchase order nor contract was ever issued to claimant, and thereafter, in November, 1918, claimants were notified that a mistake had been made, and written purchase orders would not be issued.

5. Prior to receipt of notice that a mistake had been made claimant had made expenditures and incurred obligations amounting to \$19,459.10, but subsequent to receipt of said notice was able to dispose of large portions of the jam without loss, and after negotiations claim was reduced to \$1,054.67, to cover the actual loss and carrying charge incurred by claimant.

#### DECISION.

1. The evidence discloses that the claimant company on or about October 23, 1918, entered into an agreement with Maj. H. K. Weidenfeld, Quartermaster Corps, zone supply officer at San Francisco, Calif., and on the faith of that agreement made commitments and incurred obligations.

2. The Board is therefore of the opinion that claimant is entitled to a settlement in accordance with the findings of the Board of Contract Review, Zone 13, of September 16, 1919, and approved by Maj. Gen. C. A. Devol, United States Army.

3. Certificate C will issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Averill concurring.

JUNE 5, 1920.

Case No. 2609.

*In re* CLAIM OF EDISON STORAGE BATTERY CO.

1. **INTEREST—CONSTRUCTION OF CONTRACT.**—Claimant was working under a contract which provided that payments for material should be made as soon as practicable after acceptance, and had borrowed money from the War Credits Board under a contract, which authorized the deduction of 35 per cent from each voucher to be applied on claimant's indebtedness to the War Credits Board. There was no obligation on the War Credits Board to credit claimant with the agreed percentage of a voucher until it was issued, and claimant was properly charged with interest on the unpaid balance up to the date of the voucher.
2. **CLAIM AND DECISION.**—Claim under General Order 103 for \$2,754.70 for reimbursement of interest. Held, claimant not entitled to recover.

Mr. McCandless writing the opinion of the Board.

#### FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented under General Order 103, War Department, 1918, and is for \$2,754.70. The dispute arises out of the settlement of four formally executed contracts between the Signal Corps, United States Army, and the claimant corporation, to wit:

Contract No. 2852 (order No. 41326), dated February 8, 1918.

Contract No. 2862 (order No. 41385), dated February 8, 1918.

Contract No. 3434 (order No. 41706), dated February 27, 1918.

Contract No. 3964A (order No. 42908), dated May 28, 1918.

2. In each of the above-mentioned contracts article 4 reads as follows:

“ART. IV. That for and in consideration of the faithful performance of the stipulations of this contract the contractor shall be paid at the office of the party of the first part for all supplies and materials delivered in conformity with the requirements of this contract, on or before the dates specified *and accepted*, the prices stipulated in aforementioned order making a total consideration of [here is stated the total contract price], to be paid as soon as practicable after the acceptance of the same in funds furnished by the United States for the purpose.”

3. On April 19, 1918, an agreement was entered into between the claimant and the United States, represented by O. R. Ewing, first lieutenant, Air Service, Signal Reserve Corps, acting in behalf of

the War Credits Board. This agreement was supplemental to orders Nos. 41325, 41385, 41326, and 41706, and provides in part as follows :

"ART. II. \* \* \* in order to expedite the delivery of the said supplies, the Government shall advance to the contractor under the principal agreement, an amount not exceeding the sum of two hundred ninety-five thousand dollars (\$295,000).

"ART. III. The contractor shall repay to the Government the amount of said advance, with interest on the outstanding balances of said advance at the rate of 7 per cent per annum for the month of April, 1918, and thereafter at such rate as the War Credits Board may from month to month determine.

"The contractor authorizes the Government, acting through its proper disbursing officer, to deduct 35 per cent from the gross face amount of each voucher hereafter presented by the contractor under the principal agreement, and to apply such deductions first to the repayment of this advance in full and thereafter to the payment of interest accrued on the outstanding balances, as aforesaid."

4. Production was suspended under contracts Nos. 2852, 2862, 3434, and 3964A, and on July 25, 1919, a settlement agreement was entered into containing a general release modified by the following clause.

"ART. III. \* \* \* saving to the contractor, however, the right to prosecute its said claim for excess interest, in such manner as it may deem proper, but it is understood and agreed that the Government does not in any way by anything said or done herein or hereby, admit the validity of said claim, or, if shown to be valid, the amount thereof."

5. This claim is filed pursuant to the above reservation for the purpose of recovering the sum of \$2,754.70, which, it is contended, was wrongfully charged as interest under the agreement of April 19, 1918. It appears that the total interest charged on the Government advances amounted to \$14,102.47. This figure was found by charging claimant the agreed rates of interest on the outstanding indebtedness. In determining the amount of outstanding indebtedness the Government from time to time credited the contractor with deductions made from the gross face amount of each voucher issued in payment for accepted articles. *The credits so given were given as of the dates of the vouchers.*

6. It is the contention of the claimant that the Government should have credited the deductions as of a date 10 days after the date of delivery and invoice of the finished article. The difference resulting from these two methods of computation amounts, it is claimed, to \$2,754.70. The claimant states that the delays of which complaint is made were about 40 in number, and averaged approximately 25 days each. This amounts to a complaint that the Air Service was delinquent in that payment was made approximately one month after delivery.

## DECISION.

1. In substance, the claimant alleges (1) that the Air Service failed to make prompt payments under contracts Nos. 2852, 2862, 3434, and 3964A; (2) that the War Credits Board made an overcharge for interest, in that it refused to credit claimant with payments as of a date 10 days after the date of invoice, but on the contrary credited claimant as of the date of vouchers issued by the Air Service in payment for the articles received.

2. The obligation of the Air Service relative to payments is defined by Article IV of each of the above-mentioned contracts, where it is provided that the stipulated prices are "to be paid as soon as practicable after the acceptance" of the articles delivered. The evidence submitted by the claimant fails to show that this provision was violated.

3. The obligation of the War Credits Board is defined in the agreement of April 19, 1918. By Article III of said instrument the contractor authorizes the Government to deduct 35 per cent from the gross face amount of each voucher, and to apply the sum so deducted as a payment on the War Credits Board loan. This Board is unable to find any obligation upon the part of the War Credits Board to credit the claimant with deductions as of a date prior to the date of voucher.

4. The claim is denied.

Col. Delafield and Mr. Fowler concurring.

JUNE 5, 1920.

**Case No. 2499.**

*In re* **CLAIM OF REGENSTEIN-VEEDER CO.**

1. **SUSPENSION OF CONTRACT—RENT.**—Where claimant rented additional space for the performance of a contract, since the rental agreement covered a term exceeding one year and was oral, and therefore was terminable at any time, there is no merit in a claim for reimbursement of rent paid after the contract was suspended and the manufacture of goods ceased. The rent paid prior to the suspension of production is chargeable to the completed portion of the contract and the rent paid thereafter is not a reimbursable item of cost.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$10,303.38, based upon an informal contract for targets. The Ordnance Claims Board disallowed an item for \$2,300 for rent, from which decision an appeal was taken to this Board. The rent was disallowed on the ground that lessor and lessee were practically identical companies. Affirmed, on other grounds than those stated by the Claims Board.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Ordnance Claims Board on an item for \$2,300 in a claim for \$10,303.38 under the following circumstances:
2. On or about September 23, 1918, the claimant received purchase order No. 3497 for the manufacture of 1,500,000 pasteboard targets "E" kneeling, Model 1917, deliveries to be 100,000 per month, beginning five to six weeks after receipt of the order.
3. As the claimant had not sufficient space in the factory for the manufacture of the targets, it applied to the Transo Envelope Co. for approximately 25,000 square feet of space in the latter's building. Evidence was offered by the claimant that it was orally agreed between Joseph Regenstein, secretary of the claimant, and Julius Regenstein, president of the Transo Envelope Co., that the claimant should have the above space for the term of 15 months from October 1, 1918, which was the period necessary for the completion of the contract, at \$200 per month.



4. The Government offered evidence that there was close relationship between the two companies above named. It appeared that Julius Regenstein was president and director of both companies and Joseph Regenstein secretary for both companies. Julius Regenstein owned 1,162 shares in the Transo Envelope Co. and one share in the claimant company. Joseph Regenstein owned 159 shares in the claimant company and one share in the Transo Envelope Co. Julius Regenstein is the father of Joseph Regenstein. The claimant, on the other hand, offered evidence that the two companies were operated as two distinct entities, and that there were other stockholders in the two companies who did not hold stock in both companies.

5. The claimant, on receipt of the order, proceeded with the performance of the contract. On November 14, 1918, the following telegram was received by the claimant:

"Hold up manufacture target material pending possible cancellation of order.

"L. T. HILLMAN,  
"Colonel, Ord. Dept. U. S. A., Commanding.  
"By RICHARD S. HOSFORD,  
"Captain, Ord. Dept., U. S. A."

6. On December 3, 1918, the claimant received a letter from the Ordnance Department, part of which reads as follows:

"Please refer to purchase order No. 3497, dated September 23, 1918, covering 1,500,000 pasteboard targets "E" kneeling. It is now the desire of this arsenal to reduce the manufacturing schedule on targets 75 per cent or to one-fourth of the original amount."

There followed references to Supply Circular No. 111, dated November 9, 1918, Purchase, Storage and Traffic Division, and a request for certain information and then this paragraph:

"In view of the above facts you are hereby instructed to suspend work on this purchase order to the extent of 75 per cent of its original amount, and to furnish information as requested above as soon as possible. \* \* \*"

7. The following appeared by affidavit of Joseph Regenstein:

"Under date of December 10, 1918, Joseph Regenstein, secretary of the Regenstein-Veeder Co., verbally communicated with Julius Regenstein, president of the Transo Envelope Co., stating that on account of a 75 per cent suspension order dated December 3, 1918, from the Rock Island Arsenal, we were allowed to proceed with only 25 per cent of this contract and asked a deduction from the total amount of the lease, and it was verbally agreed between Joseph Regenstein, secretary of the Regenstein-Veeder Co., and Julius Regenstein, president of the Transo Envelope Co., to make an allowance on our agreement of \$700 on the lease for space at the Transo Envelope Co.'s plant. It was also agreed that the Regenstein-Veeder Co. were to vacate the Transo Envelope Co.'s premises as

soon as 25 per cent of the contract was filled. On account of embargoes, etc., at the arsenal we were delayed by the arsenal in giving prompt shipment of the 25 per cent of the contract, and same was not completed until July 1, 1919."

8. Mr. Julius Regenstein, called as a witness by the claimant, testified that in order to give the claimant space the Transo Envelope Co. crowded itself "tremendously"; that it needed the room for itself; that the rental of \$200 was "ridiculous" and a "joke"; and that they could rent the same space to-day for 65 cents a square foot.

9. It appears that the rental of the first two months of the contract—that is, October and November, 1918—has been allocated as a part of the unit cost of a completed portion of its contract, and no appeal has been taken from such action. The rental for these two months is, therefore, not now before us.

10. The Cost Accounting Section of the Chicago District Claims Board, after investigation, estimated that two and three-fourths months was necessary to complete the uncanceled portion of the contract.

11. The Rock Island Arsenal Claims Board allowed the present claim in the sum of \$600.

12. When the matter came before the Ordnance Claims Board at Washington the claim was disallowed on the ground that the Transo Envelope Co. was part of the Regenstein-Veeder Co., the two companies being operated under the same management, and upon the further ground that the claim for rental was not one that could properly be included in the settlement under award.

13. This appeal is taken from the decision of the Ordnance Claims Board.

#### DECISION.

1. The claimant in the present case is asking reimbursement on account of a commitment which it made in the form of an oral lease of premises for the performance of its contract.

2. We do not find that the Government has shown that the lessor and lessee companies were identical so as to render the use of the premises in question practically a use by the claimant of its own premises. Corporations are separate entities in the eyes of the law. While it is apparent that directorates of the two companies were what has been called "interlocking" directorates, and that the two companies had certain officials in common, it is equally clear that the stock ownership was by no means identical in the two companies. There were stockholders in each company who held no stock in the other, and the holder of what was apparently a large controlling interest in the Transo Envelope Co. held only one share of stock in the claimant company. Likewise the holder of the controlling inter-

est in the claimant company owned only one share of stock in the Transo Envelope Co. We should not disallow the claim on the ground that the companies were identical.

3. The lease, on account of which this claim is made, was oral. The evidence of the lease comes from interested parties, and it is in some respects unsatisfactory on account of indefiniteness. On the other hand, the Government has offered no evidence directly contradicting the existence of the lease, and the arrangement covered by the lease was reasonable under the circumstances, both as to time and as to the rent reserved. We find that an oral lease was entered into by the claimant substantially as claimed.

4. The lease, being oral and being for more than a term of one year, was not binding upon the parties, and could have been terminated at any time by the claimant. Furthermore, it is obvious from the testimony of Mr. Julius Regenstein, president of the lessor company, that no damages would have resulted to his company from the termination of the lease, because the space was badly needed for its work by the lessor company, and the rent reserved was at a figure so low as to be "ridiculous."

5. If nothing further had been shown than the existence of the lease, it would have been the duty of the claimant to terminate its tenancy at the earliest possible moment after it was advised of the cancellation of its contract, and in so doing the claimant would not have been liable for rent beyond the term of actual occupation by it.

6. In the present case, however, it appears that on December 10, 1918, the claimant and the president of the lessor company met and agreed that the tenancy should terminate at the completion of that part of the contract (25 per cent), which the claimant was allowed to perform. The local board found that the time necessary for the completion of 25 per cent of the contract was two and three-fourths months after December 3, 1918.

7. The interview of December 10 shows also that it was entirely practical for the claimant to vacate the premises when it had performed the uncanceled part of its contract—that is, two and three-fourths months after December 3.

8. From December 3 the claimant was engaged in the performance of the uncanceled portion of its contract, and was occupying the leased premises for that purpose. We find that the rental accruing during this period should be properly allocated and chargeable to the part of its contract which it was then completing, with, however, one possible exception.

9. In numerous settlements, both before this board and by local boards, it has been recognized that the manufacture of the first delivery under a contract is more expensive per item than the manu-

facture of the last items. In other words, as a general rule, the cost of producing the particular article in quantity constantly lessens from the production of the first to the production of the last item. It appears in the present case from calculations of the officials of the local board that it took the claimant four and three-fourths months to produce the first 25 per cent of the articles called for in its contract. This might possibly be reduced to four months if we assume that the claimant ceased all operations from November 14, the date it was notified to suspend, to December 3, the date when it was directed to complete a portion of its contract. In either event, it is obvious that the time per item taken in the performance of the first 25 per cent of the contract was greater than the time per item allowed for the performance of the entire contract. We think it might well be made to appear that if the claimant had completed its contract, it could have manufactured the balance, or 75 per cent of the contract, in less time per item than the time consumed for the first 25 per cent. If so, then part of the cost of rental for this 25 per cent might justly and fairly be allocated to the expense of 75 per cent and allowed to the claimant in settlement of its costs incurred by reason of cancellation of the 75 per cent.

10. The question last above referred to is not before us in the present case. It should be a matter to be determined in connection with the general settlement.

11. We find that the expenses of the claimant for rental as such should properly be chargeable to that part of its contract which it was allowed to complete.

12. While under ordinary circumstances the claimant would have completed the uncanceled portion of its contract in two and three-fourths months, there is some evidence that the claimant was compelled by reason of embargoes to hold manufactured goods on hand to July 1, 1919, and so was put to extra expense. If such was the case, the extra expense is chargeable to the completed portion of the contract.

13. We find, so far as the present claim is concerned, that any expense to which claimant was put for rental is properly chargeable to its completed part of the contract, and is not allowable herein.

#### DISPOSITION.

1. Claimant's appeal is dismissed, and a copy of this opinion will be sent to the Ordnance Claims Board.

Col. Delafield concurring.

JUNE 5, 1920.

**Case No. 2057.**

*In re* **CLAIM OF BRIDGEPORT BRASS CO. (REHEARING).**

1. **CLAIM AND DECISION.**—Claim for \$79,958.57, under the act of March 2, 1919, for increased wages. Held, on rehearing that claimant is entitled to recover. The facts in this case are the same as in the case of the same claimant, No. 1993, decided by this Board March 26, 1920, except as to the amounts claimed. The facts in that case are referred to and incorporated in the decision in the instant case by reference. The decision of this Board in the instant case, under date of March 25, 1920, dismissing this claim on the ground that relief, to which claimant was entitled, had been given it by this Board's decision in case No. 1993, is vacated, for the reasons stated in the decision in case No. 1993. The Board finds that claimant is entitled to receive reimbursement for the additional sums (including back wages) it was required to pay for increased labor cost on account of the ruling of the War Labor Board, providing, however, that claimant should not be entitled to recover in this case any sums which it shall receive under the decision in case No. 1993. For the reason stated in the opinion in the case of the Eastern Malleable Iron Co., No. 2407, claimant is entitled to no other relief than as above stated. For summary of facts and syllabus, see case No. 1993.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. Under date of March 25, 1920, this Board entered its decision dismissing the above case on the ground that the relief to which the claimant was entitled had been granted by this Board upon the claim of the company filed as case No. 1993.

2. The claimant has now requested the reopening of the present case for the reason, as it alleges, that the entire relief to which it is entitled can not be obtained under the aforesaid case No. 1993.

3. It appears that both the present case and case No. 1993 involve claims under the terms of contracts Nos. P-11393-2887-A, dated July 6, 1918, P-13509-3310-A, dated August 13, 1918, and P-17195-4157-A, dated October 26, 1918. The claims in both the cases are founded upon the same clause in said contracts and arise under the same circumstances.

4. We find that the facts in this case are identical, except as to the amounts claimed under said contracts, with the facts set forth by this Board in its decision filed in said case No. 1993, and the facts therein stated are hereby referred to and incorporated in this decision.

DECISION.

1. The above case is hereby reopened and the decision heretofore filed under date of March 25, 1920, is vacated and the present decision of this Board is substituted therefor.

2. For the reasons and upon the conditions stated in the decision of this Board in case No. 1993, we find that the claimant is entitled to receive reimbursement for the additional sums (including back wages) it was required to pay for labor cost in connection with its contracts hereinbefore referred to by reason of the wage scales set by the War Labor Board over and above what it would have paid under the wage scale prevailing, in the performance of said contracts immediately prior to such award, to wit, August 28, 1918: *Provided, however,* That the claimant shall not recover hereunder any sums which it shall receive under the decision of this Board in said case No. 1993.

3. For the reasons stated in the opinion in the case of the Eastern Malleable Iron Co., case No. 2407, we find the claimant in this case is not entitled to relief except as hereinbefore specified.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmit its decision to the Ordnance Claims Board for appropriate action.

Col. Delafield concurring.

JUNE 5, 1920.

Case No. 2641.

*In re* CLAIM OF MONMOUTH CHEMICAL CO.

1. **FACILITIES IN ANTICIPATION OF GOVERNMENT ORDERS.**—Where a manufacturer of chlorate, learning of the needs of the Government therefor, and of proposed changes in specifications, installs special facilities for the manufacture of chlorate according to the proposed revised specifications, but without any agreement, express or implied, with any authorized agent of the Government, there is no obligation on the Government to reimburse claimant.
2. **CLAIM AND DECISION.**—Claim for \$10,520.73, under the act of March 2, 1919, for special facilities for the manufacture of bromate free chlorate. Held, no agreement within the meaning of said act.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the Ordnance Department. The claim is for the cost of special facilities provided by claimant in reliance on the above alleged agreement. A hearing was held on June 3, 1920.

STATEMENT OF FACTS.

1. During the latter part of 1917 and spring of 1918 the Estimates and Requirements Division of the Ordnance Department instituted a small-arms ammunition program which was expected to call for the supply of approximately 200,000 pounds of chlorate of potash for cartridge primers, and this program was transmitted to the Production and Procurement Divisions of the Ordnance Department for location of supply.

2. It seems that the chlorate of potash which had been furnished up to that time under existing specifications was not altogether satisfactory, and it became the desire of the Ordnance officials to adopt amended specifications calling for bromate free chlorate. At this time the manufacture of the last-mentioned chemical was largely controlled by one source of supply, which for various reasons was not immediately available, and the claimant company appears to have been one of the few other sources of supply at that time in the market.



3. Under these circumstances the claimant took up with the officials of the Frankford Arsenal the question of manufacturing this chemical by a process which claimant had worked out, and various conferences were held between claimant's officials and Dr. A. S. Cushman, supervising chemist of the Frankford Arsenal, on the subject, the result of which was that the claimant was referred to the officials of the Ordnance Department in Washington, whom at that time Dr. Cushman was trying to persuade to adopt new specifications calling for bromate free chlorate.

4. Claimant explained to the Ordnance officials in Washington that it was prepared to undertake the manufacture of bromate free chlorate, provided it could obtain sufficient orders to make worth while the necessary installations for that purpose, and expressed a willingness to guarantee a supply of 100,000 pounds on a contract for one year. These conferences took place about the 1st of June, 1918, at which time the issuance of amended specifications covering bromate free chlorate had been seriously taken up by the Ordnance Department, and the probability of their issuance was apparently freely discussed by all concerned. Such amended specifications were actually issued officially on June 25, 1918.

5. In the meantime claimant, knowing the expected requirements of the Government for this material and the probability of the specifications being amended so as to cover it, had undertaken some of the commitments which are covered by its claim, and up to July 8, 1918, had incurred considerable obligations for that purpose.

6. On June 16, 1918, Mr. Frank Kidde, secretary of the claimant company, had an interview at Washington with Lieut. A. H. Ferrendou, of the Small Arms Section of the Procurement Division, Ordnance Department. The evidence is to the effect that at this conference Mr. Kidde explained to Lieut. Ferrendou that claimant was prepared to manufacture bromate free chlorate and was desirous of receiving orders, lest its process should be made use of by its commercial competitors to claimant's disadvantage. In view of the fact that claimant had shown more disposition to cooperate with the Ordnance Department than some other manufacturers, Lieut. Ferrendou welcomed the source of supply presented by Mr. Kidde, and undertook to avail himself thereof by suggesting to manufacturers of ammunition that they purchase the bromate free chlorate from claimant under certain conditions. These conditions are contained in a circular letter which Lieut. Ferrendou wrote to various ammunition manufacturers, dated July 8, 1918, containing the following statement:

"It is requested, in justice to the Monmouth Chemical Co., that when you are in the market for chlorate of potash, if their state-



ments relative to compliance with specifications are correct, they be given an opportunity to furnish some of your requirements."

7. Claimant bases its claim on the following contention: That the Government was anxious to obtain 200,000 pounds of bromate free chlorate; that claimant was willing to furnish 100,000 pounds of that amount provided that the specifications of the Ordnance Department then in force would be amended so as to permit the use of this chemical, and offered to supply to the Ordnance Department this quantity of the material on these conditions; that the Ordnance Department thereafter amended its specifications accordingly, thereby accepting the claimant's proposal, and that the letter which Lieut. Ferrendou addressed to ammunition manufacturers constituted a direction to those manufacturers to purchase the chlorate from claimant in accordance with this agreement and by way of confirmation thereof.

#### DECISION.

1. The evidence as presented to this Board does not sustain the claimant's contention.

2. The claim is for special facilities, and there is no evidence that these facilities were installed at the direction, request or suggestion of any Government official. The evidence is clear that the claimant had a process for the manufacture of bromate free chlorate and a plant which could be adapted to that purpose, with some additional equipment. Knowing that the Government expected to use 200,000 pounds within the next year, claimant estimated, without consultation with any Government officials, that half of this amount would be taken care of by certain large manufacturers already in touch with the Government, leaving the probable amount of 100,000 pounds for other manufacturers including the claimant. That relying on the probability of a change in the Ordnance Department specifications requiring bromate free chlorate, claimant prepared itself for its manufacture purely as a matter of business judgment, in the expectation of receiving sufficient orders to amortize its additional undertakings in the way of special facilities. There is no evidence that the figure of 100,000 pounds of material was anything more than the claimant's own estimate, or that the change in the specifications was due in any way to any request or action of the claimant, or that any of the Ordnance officials with whom claimant had any dealings had anything to do with the issuance of the amended specifications beyond possibly their recommendation as a matter of good Ordnance practice, the terms of the specifications and the date and purposes of their issuance being entirely in the hands of the Engineering Division, with

which claimant had no transactions, so that there is nothing to connect the issuance of the specifications in any such way with claimant's willingness to manufacture as to indicate that the specifications were the result of claimant's presence in the field. As to the letters of Lieut. Ferrendou to the other manufacturers, they can not be construed as anything more than the limited and conditional request which their language expresses, and Lieut. Ferrendou himself testified that they were written for no other purpose than to suggest to these manufacturers a possible source of supply.

3. There is nothing in the case from which any obligation to reimburse claimant the cost of its facilities could be implied, and the evidence as a whole, therefore, does not show any agreement within the terms of the act of March 2, 1919.

#### DISPOSITION.

An order denying relief will be issued.  
Col. Delafield and Mr. Hope concurring.

JUNE 5, 1920.

**Case No. 2665.**

***In re* CLAIM OF ECLIPSE STOVE CO.**

1. **EXPRESS CHARGES.**—Where the Government agrees with claimant that it will reimburse claimant for all direct expense in the manufacture of a rolling kitchen, according to directions of the Standardization Rolling Kitchen Board, and claimant so manufactured the kitchen and sends it by express to the Government and the kitchen is received, accepted, and paid for by the Government, claimant is entitled to be reimbursed for the express charges paid thereon by it.
2. **CLAIM AND DECISION.**—Claim for \$125.76 under the act of March 2, 1919, for express charges on a moving kitchen. Held, an agreement within the meaning of said act.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States. The amount claimed is \$125.76.
2. In the spring of 1918 the Standardization Rolling Kitchen Board was authorized and appointed by the Secretary of War for the purpose of improving the type of rolling kitchen then in use. The first president of the Board was Col. E. S. George.
3. Under instructions of Col. George, Capt. E. S. Church reported to Lieut. Col. Dean Halford, M. T. C., executive officer, one of the members of said Board, at New York City, for the purpose of improving the details in the construction of the rolling kitchens and having the kitchen manufactured and placed before the Board for a test.
4. Lieut. Col. Halford and Capt. Church met representatives of several companies, including the claimant, at a conference on or about April 16, 1918. It was there mutually agreed that the claimant should construct a new rolling kitchen to be designed by its engineers, and that the Government would reimburse claimant for the expense of materials and other direct expense of producing the kitchen, excluding, however, any charges for overhead or other indirect expenses in connection therewith.

5. Claimant thereupon manufactured a 200-man model Liberty kitchen and one cooker section of a 300-man model Liberty kitchen, and on November 14, 1918, sent them by express from Mansfield, Ohio, to Camp Merritt, N. J., where they were received by the Standardization Rolling Kitchen Board. The kitchen and cooker were thereupon tested and found to be satisfactory. Claimant paid the express charges on the shipment in the amount of \$125.76.

6. Under date of October 16, 1919, a certificate of fair value was issued, under the authority of the Quartermaster General, Director of Purchase and Storage, covering the expense to which claimant had been put in the manufacture of the kitchen and cooker, excepting, however, and excluding the amount paid for express as aforesaid. The claimant received the amount so certified, but has never been reimbursed for its expense incurred for express charges.

#### DECISION.

1. We find that an informal agreement was entered into between the duly authorized agent of the Secretary of War and the claimant to reimburse the claimant for direct expense in connection with the manufacture and shipment of a rolling kitchen and cooker section, and that the amount paid for express was an expense for which claimant is entitled to reimbursement. Claimant has already received reimbursement for all expenses in connection with the kitchen and cooker, excepting the expense for express. It is now entitled to receive the latter amount, to wit, \$125.76.

#### DISPOSITION.

1. This Board will make a statement of the nature, terms, and conditions of the agreement and certificate "C" and will cause the amount due the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division, and will make a statutory award and cause the same to be executed on behalf of the United States and by the claimant and transmitted to the appropriate finance officer for payment.

Col. Delafield concurring.

JUNE 5, 1920.

Case No. 2681.

*In re* CLAIM OF JACOB REED'S SONS (INC.).

1. **CONSIDERATION—BONUS CLAUSE.**—Where claimant, a cloth manufacturer, received a supplemental contract containing a provision for a bonus for the exercise of special care in cutting Government materials, while the supplemental contract would have been void for want of consideration if it merely added the bonus provision to the original contract, it was not void in the present case, because it changed the specifications and price contained in the original contract and practically amounted to a new contract.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$5,983.36, based upon a proxy-signed contract for woolen coats and breeches. Held, claimant is entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Office of Director of Purchase, on a claim for \$5,983.36 on an informally executed contract under the following circumstances:

2. On July 20, 1917, the claimant company entered into a contract, No. 208, signed by Maj. Fred A. Ellison, quartermaster, United States Reserves, for Col. M. Gray Zalinski, Quartermaster Corps, United States Army, for the manufacture of 100,000 olive-drab woolen coats, at \$1.749 each, and 125,000 pairs olive-drab breeches, at \$0.737 each. This contract required deliveries in stated amounts during the months of January, February, and March, 1918, and provided that the said contract expires March 31, 1918. It contains the following pertinent provisions:

“The articles to be manufactured from materials furnished in part by the Quartermaster Corps, received by the contractor at the Philadelphia depot, and the finished garments to be delivered at the depot of the Quartermaster Corps, United States Army, Philadelphia, Pa. \* \* \*

“The materials to be taken from and the finished garments returned to the Philadelphia depot, Quartermaster Corps, without expense to the United States for packing and transportation. The cost of packing materials for shipment from the Philadelphia depot is to be charged against the contractor.

"The contractor will be liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps from any cause whatsoever while in its possession.

"Provided, That the Government reserves the right to purchase all rags or clippings which can not be used in the manufacture of uniforms at such price or prices in accordance with grades or qualities, as may be determined later by the proper authorities of the Department of Commerce."

In the specifications attached to and forming part of said contract the following provisions are made:

"No improper cutting or skimping in any manner will be permitted. The contractor's liability in this respect will continue even though the garments may have been accepted and paid for.

"Any quantities of materials issued by this corps to the contractor in excess of allowances below noted, will be charged against his contract and any of the material furnished remaining unused at the completion of the contract shall be returned to the depot where deliveries are made, except all clippings and ends, which can not, in the opinion of the contracting officer, or his successor, be utilized in the manufacture of those articles, may be retained by the contractor."

Then follows a schedule of the quantities of materials that will be furnished by the Quartermaster Corps in connection with the manufacture of the breeches and coats of various sizes called for in the contract.

3. On December 26, 1917, the claimant entered into a supplemental agreement for modification of contract No. 208, which said agreement was signed by Capt. V. Stone, Quartermaster Reserve Corps, for Col. M. Gray Zalinski, Quartermaster Corps, United States Army, which provides, amongst other things as follows:

"And whereas it is found advantageous and in the best interests of the service of the United States to modify the provisions of said contract (No. 208) as specified below:

"Now, therefore, it is hereby agreed that the provisions of said contract shall be changed in the following particulars and in these respects only.

"That the manufacture of approximately one hundred and twenty-five thousand (125,000) pairs wool, foot breeches, shall be stopped, and in lieu of the breeches remaining undelivered under said contract, the contractor is to deliver wool breeches, new pattern, made as per specification requirements No. 1286, except that silk thread is to be used for stitching instead of mercerized cotton, and for each pair so made, delivered and accepted, the contractor is to receive ninety-five cents (\$0.95), instead of the price stipulated in the said original contract.

"All rags and clippings from materials furnished by the Quartermaster Corps are to remain the property of the United States, to be accumulated, packed in bags or baled, and held for such disposition as may be directed by the contracting officer."

Attached to the said contract and forming a part thereof is specification requirements No. 1286, referred to in said contract, to which, following the specification, there is attached a typewritten paper which contains the following provisions:

"That in cutting textile materials furnished by the United States for use in the manufacture of garments, etc., under this contract the contractor shall use best efforts to avoid all possible waste. For the additional work and special care so involved the contractor shall be paid, as separate compensation and premium, an amount equal to 20 per cent of the net cost price of such Government-owned textile materials to the extent of the saving in uncut yardage in the piece (piece goods) on comparing the quantities actually used in the cutting with the allowances for the purposes listed in the accompanying schedules, the material of the yardage so saved to remain the property of the United States. There shall not, however, be any skimping whatever in the cutting for the garments, etc., and in event of the violation of this condition no compensation shall be made for the saving in yardage resulting from the lays of such skimmed cutting, and the Government shall also have the election of annulling the contract for such cause."

4. It appears that on April 15, 1918, Capt. V. Stone, assistant to the depot quartermaster, Philadelphia, wrote to the claimant extending the time for the performance of its contract to June 22, 1918. Authority to make this extension was given the depot quartermaster by letter of April 6 from the purchasing and contracting officer, Supplies and Equipment Division.

It further appears from the evidence that the contractor completed its said contracts and has been paid the price stipulated therein for the articles furnished.

5. It appears that on September 27, 1917, the Quartermaster General wrote the depot quartermaster, Philadelphia, Pa., directing that all contracts entered into after that date should contain the bonus clause above quoted, which was made part of the supplemental contract dated December 26, 1917, and also requested the depot quartermaster to have supplemental agreements made embodying this provision for all contracts still in force. The claimant and other clothing manufacturers learned of this letter of instructions and contends that it immediately adopted measures to save on Government-owned material.

6. At the hearing Mr. Irving L. Wilson, president of the claimant company, was the only witness. He testified that when he signed the supplemental contract of December 26, 1918, the paper containing the bonus clause was physically attached to the contract and that it was one of the inducements which caused him to sign the said contract. He testified that the claimant did not begin cutting any of the material on contract No. 208 until about January 2, 1918, after the execution of the supplemental agreement, because it was working on



prior Government contracts in which it had been delayed. Mr. Wilson testified that during the performance of two of the said prior contracts and about the middle of the summer of 1917 the Government inspector at his plant had objected to the manner in which the claimant was laying out the Government-owned material in that it was cutting from materials laid on top of materials of different widths which caused a substantial loss in the clippings left over from the material of broader width. Thereupon Mr. Wilson gave his superintendent instructions to make the laying out only from materials of the same width, and this required greater accuracy and increased cost in the manufacturing process. On October 23, 1917, Mr. Wilson wrote the depot quartermaster, Philadelphia, requesting that the claimant be furnished only with cloth on which the width was marked so that it could make the proper layout as required by the inspector. It sufficiently appears from the testimony of Mr. Wilson that substantial changes were brought about in claimant's factory after the inspector had objected to the manner in which the claimant's workmen were laying out the goods. However, Mr. Wilson testified that after the contents of the letter of the Quartermaster General of September 27, 1917, became known he directed his superintendent to use his best efforts to save Government-owned goods, and care was taken in laying out the goods and in saving the ends of a roll of material which were not used. All of these precautions he alleges entailed additional labor and expense, although he could not specify what additional expense the claimant had been put to. It is clear from the testimony of Mr. Wilson that the new methods of saving with more accurate laying out of the goods was fully established in the claimant's factory prior to December 31, 1917, which was before the time when the claimant began cutting any material under contract No. 208 of July 20, 1917, as modified by the supplemental agreement of December 26, 1917.

Mr. Wilson further testified that no material under contract No. 208 or the supplemental agreement was cut until January 2, 1918, and he explained as the reason for this delay that the claimant had been delayed in its prior contracts and in getting in new machinery, and that the Government did not furnish the material in sufficient quantities to begin operations on contract No. 208.

7. On cross-examination Mr. Wilson admitted that while the bonus clause was a great inducement to a contractor to save Government-owned material, nevertheless all adequate precautions and instructions to save had been made and given during the performance of the prior Government contracts and prior to December 31, 1917. When interrogated about two other claims which Jacob Reed's Sons have made to the Claims Board, Director of Purchase, for a bonus allowance on two prior contracts, Mr. Wilson's attention was drawn



to the fact that his company had made a greater saving per garment under those prior contracts than under contract No. 208. When asked to explain this difference he testified that it was greatly a matter of luck, and although precautions were taken to insure saving on Government-owned material, such precautions could not insure more than a reasonable chance of saving.

8. The claimant contends that the supplemental agreement of December 26, 1917, modifying contract No. 208 (1) required it to manufacture a totally different kind of wool breeches from that required in the original contract; (2) that it deprived the contractor of all rags and materials left over from the cuttings, which, under the original contract, the Government had the right to purchase from the contractor; and (3) that the principal inducement for it to execute the supplemental agreement was the bonus clause which did provide additional compensation to the claimant provided it pursued the new methods of saving on Government-owned materials which it had adopted.

Attached to the petition in this case is a summary of the facts on which the claim is based. In this summary the claimant asserts that the Government allowances for 102,711 olive drab wool coats and 130,819 pairs of olive drab wool breeches which it manufactured and which were accepted under the said contract No. 208, dated July 20, 1917, as modified by supplemental agreement of December 26, 1917, was 274,553 yards 22 inches; that it used 364,974 yards 4½ inches of said material, thereby saving to the Government 9,579 yards 17½ inches. It similarly asserts that it saved 2,813¼ yards of olive drab luster wool serge; 2,853½ yards of olive drab silesia; 2,493¾ yards 9-ounce duck; and 2,271¼ yards of drilling. The total aggregate value of all of said material was \$29,916.85, and 20 per cent of said amount is \$5,983.36, which the claimant contends it is now entitled to under the bonus-clause provision of the supplementary contract of December 26, 1917.

#### DECISION.

1. In reaching a decision in this case we are necessarily guided by the decision of the Secretary of War in the claim of Heidelberg, Wolff & Co., No. 30, in so far as the same is applicable to the facts presented by the record now under consideration.

In the Heidelberg, Wolff & Co. case the Secretary of War decided (as shown by the opinion of Judge E. Henry Lacombe, dated February 17, 1920, and concurred in by his associate advisers to the Secretary of War), that where an independent contract was entered into between the Government and a contractor which contained the 20 per cent bonus clause for saving on Government-owned material, and that although the bonus clause as phrased added nothing to the

obligation of the contractor to use his best efforts to avoid all possible waste, nevertheless, the contract was not severable and if the contractor fulfilled his obligations in using his best efforts to save on Government-owned material he is entitled to be paid the price which the Government had agreed to pay him according to the terms of the bonus clause. In other words, Judge Lacombe, in effect, holds that an independent contract containing the bonus clause is to be considered as an entirety and although the bonus clause imposes no additional obligation on the contractor, the clause shall not be rejected for lack of consideration, because the entire contract carries consideration.

On the other hand, Judge Lacombe holds that where a contract is entered into for the manufacture of clothing, by the use of Government-owned material, which provides that the contractor will be responsible for damage to said material while in its possession, the contractor is bound to use the same degree of care that a reasonably careful prudent man would exercise in the cutting up of his own material. Therefore, when the Government enters into a supplemental agreement with the contractor purporting to allow the contractor a bonus of 20 per cent for additional work and special care involved in using his best efforts to avoid all possible waste, which said subcontract contains no other provisions whatsoever than those relating to the bonus, the said supplemental contract is void because there was no consideration, in that the bonus clause imposed no additional obligation on the contractor than his existing obligation under the original contract to use his best efforts to avoid all possible waste. It was, therefore, held that the bonus clause appearing in the supplemental contract was a mere gratuity and for such reason the supplemental contract is void.

2. In the case now under consideration the original contract of July 20, 1917, with Jacob Reed's Sons (Inc.) contained no bonus clause, but required the contractor to manufacture 100,000 coats at \$1.749 each, and 125,000 pairs breeches at \$0.737 each. The breeches were to be manufactured according to specification No. 1161, which minutely sets forth the requirements which must be complied with in the manufacture of the breeches. On December 26, 1917, a supplemental agreement was entered into with the contractor modifying the contract of July 20, 1917, which provided that the manufacture of the breeches under the original contract should stop and the contractor should deliver breeches of a new pattern made according to specification requirements No. 1286, for which it should receive the price of \$0.95 each. Specification requirements No. 1286 are totally different from specification requirements No. 1161 under the original contract. The price of the breeches is different, and by entering into a supplemental contract the contractor agreed, in effect, to a

cancellation of the prior contract in so far as it affected delivery of the balance of the breeches called for in the original contract at the price stipulated therein. The testimony showed that the cost of manufacturing the breeches of the new pattern required to be made by the supplemental contract was in excess of the cost to manufacture the breeches according to the requirements of the original contract, and that one of the inducements for entering into the said supplemental contract was the bonus clause, which was made part of the supplemental contract. It would be futile to argue that there was no consideration for entering into the supplemental contract. We are of the opinion that this claim is readily distinguishable from that part of Judge Lacombe's decision which relates to an original contract made without a bonus clause, followed by a supplemental contract which contains a bonus clause and no other provision whatsoever, and so his holding that there was no consideration for the supplemental contract does not apply to this case. We are of the opinion that the other part of Judge Lacombe's decision is fully applicable to this case. It holds that where a valid contract is entered into which contains a bonus clause and where it is shown that the contractor uses his best efforts to save on Government-owned material, he has laid the foundation for payment of the 20 per cent bonus promised by the Government according to the terms of the contract. Under the latter holding Judge Lacombe was of the opinion that the clause relating to the manufacturing of the articles and the clause relating to the bonus were not severable, but together they constituted one entire contract. We may add that it necessarily follows if the contract to manufacture is based on the consideration, and if the provision to pay a bonus is to be considered a valid part of that contract, because there is one consideration for the whole agreement, it would follow that it is immaterial whether a bonus clause appeared in an original contract, as in the Heidelberg Wolff case, or in a supplemental contract which carried with it the consideration, as in the instant case. It is only when a bonus is offered in a supplemental contract, which is based on no consideration, to do that which the contractor was already obligated to do under the original contract that the supplemental contract can be said to lack consideration and the bonus provision therein held to be a mere gratuity.

3. The contention was made at the beginning that because the original contract contained a provision that the Government reserves the right to purchase all rags or clippings which can not be used in the manufacture of uniforms that the rags and clippings became the property of the contractor. Hence it was contended that the supplemental contract took away the contractor's right to the rags and clippings in that it provided that they should remain the property of the Government. The claimant therefore contends that the

waiver of its right to the rags and clippings as contained in the supplemental contract was an additional consideration for entering into said supplemental contract. The contract was indisputably one of bailment, and the title to all the Government-owned material remained at all times in the Government, and the contractor obtained no title to any part of the material during the performance of the contract. He was liable, under the terms of the contract, for loss or damage to any of the material while in his possession. The provision in the contract that the Government should purchase rags and clippings would seem to be illegal and void in that it, in effect, provided that the Government should purchase its own material. This clause can not operate to have changed the title in the rags and clippings from the Government to the contractor. In the decision of this Board in the Heidelberg-Wolff case, it was held that the Government never lost title to the rags and clippings; but on rehearing, it was decided that the question was not presented for determination, and the Secretary of War, therefore, did not pass upon this specific question. In so far as the question of the title to the rags and clippings is only raised in this case for the purpose of showing consideration for the supplemental agreement, and inasmuch as we are of the opinion that there is sufficient consideration to support the supplemental agreement without passing on the question of the title to the rags and clippings under the original contract we are of the opinion that that question is not involved in this claim.

4. Finding as we do that the supplemental contract of December 26, 1917, is based upon consideration that supports its validity and that the claimant has performed the said contract by delivering the breeches required by its terms to be delivered and also finding as we do that the said supplemental contract is to be considered in its entirety as one complete contract and not severable in its terms, so as to separate the bonus clause from the other part of the contract, we are of the opinion that, as the record shows that the contractor used its best efforts to avoid waste and was as careful with Government-owned material as it should have been with its own, the claimant has, therefore, fulfilled all its obligations and is entitled to be paid the price which the Government agreed to pay for such fulfillment.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate "C" to the Claims Board, Director of Purchase, for action in the manner provided in subdivision "C," section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hendon concurring.

JUNE 5, 1920.

Case No. 2454.

*In re* CLAIM OF MORGAN ENGINEERING CO.

1. **SUPPLEMENTAL CONTRACT—CONSIDERATION.**—Where a supplemental contract is entered into after the time of performance has expired, fixed in an original proxy-signed contract and in formal contracts supplementing proxy-signed contracts, and without new or additional consideration moving to the Government for the express purpose of validating the proxy-signed contracts, such supplemental contract so entered into is invalid.
2. **PROXY-SIGNED CONTRACTS, EFFECT OF—MODIFICATION BY FORMAL SUPPLEMENTAL CONTRACT.**—Where a formal supplemental contract is entered into for the purpose of modifying the terms of a prior proxy-signed contract and continues the proxy-signed contract in force and effect except as modified, the effect of such supplemental contract is merely to continue the informal contract in force and effect as modified without giving it the effect of a formal one.
3. **CONSTRUCTION OF CONTRACT—FINAL JUDGMENT OF DETERMINING OFFICER.**—Where the parties to a contract agree therein upon some one to finally determine disputes thereunder, the determination of such person will be final in the absence of fraud or such gross mistake as to imply fraud in his decision.
4. **EXTENSION OF TIME—LIQUIDATED DAMAGES.**—Where a contract provides that the contractor shall pay the Government liquidated damages therein fixed, in case of delay except for certain causes, and the contractor is delayed in the performance of its contract by causes the responsibility for which it is exempted, and the contract provides that the contracting officer shall extend the time of performance for a period equal to that during which the contractor was so delayed, the determination by the contracting officer that claimant is entitled, on account of such causes, to such an extension of time for a period fixed by him is final and conclusive in the absence of fraud or gross mistake implying fraud on his part.
5. **SAME.**—The contracting officer does not lose his authority to extend the time of performance in a contract by reason of the fact that such extension is not granted until after the expiration of the time of performance, if such extension is granted for causes occurring during the time when the contractor was not in default.
6. **LIQUIDATED DAMAGES—WAIVER OF.**—Liquidated damages can not be waived by a Government officer, but an extension of time provided for in the contract is not a waiver, but a mere compliance with its terms.
7. **SECRETARY OF WAR—JURISDICTION OF UNDER THE ACT OF MARCH 2, 1919.**—Under the act of March 2, 1919, the Secretary of War is given original jurisdiction to adjust, pay, and discharge informal agreements falling within the terms of said act, to the exclusion of other agencies of the Government, and his jurisdiction is not ousted by attempted determination of claims arising under such agreements by administrative agencies of the Government outside of the War Department.



"The contractor will be liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps from any cause whatsoever while in its possession.

"Provided, That the Government reserves the right to purchase all rags or clippings which can not be used in the manufacture of uniforms at such price or prices in accordance with grades or qualities, as may be determined later by the proper authorities of the Department of Commerce."

In the specifications attached to and forming part of said contract the following provisions are made:

"No improper cutting or skimping in any manner will be permitted. The contractor's liability in this respect will continue even though the garments may have been accepted and paid for.

"Any quantities of materials issued by this corps to the contractor in excess of allowances below noted, will be charged against his contract and any of the material furnished remaining unused at the completion of the contract shall be returned to the depot where deliveries are made, except all clippings and ends, which can not, in the opinion of the contracting officer, or his successor, be utilized in the manufacture of those articles, may be retained by the contractor."

Then follows a schedule of the quantities of materials that will be furnished by the Quartermaster Corps in connection with the manufacture of the breeches and coats of various sizes called for in the contract.

3. On December 26, 1917, the claimant entered into a supplemental agreement for modification of contract No. 208, which said agreement was signed by Capt. V. Stone, Quartermaster Reserve Corps, for Col. M. Gray Zalinski, Quartermaster Corps, United States Army, which provides, amongst other things as follows:

"And whereas it is found advantageous and in the best interests of the service of the United States to modify the provisions of said contract (No. 208) as specified below:

"Now, therefore, it is hereby agreed that the provisions of said contract shall be changed in the following particulars and in these respects only.

"That the manufacture of approximately one hundred and twenty-five thousand (125,000) pairs wool, foot breeches, shall be stopped, and in lieu of the breeches remaining undelivered under said contract, the contractor is to deliver wool breeches, new pattern, made as per specification requirements No. 1286, except that silk thread is to be used for stitching instead of mercerized cotton, and for each pair so made, delivered and accepted, the contractor is to receive ninety-five cents (\$0.95), instead of the price stipulated in the said original contract.

"All rags and clippings from materials furnished by the Quartermaster Corps are to remain the property of the United States, to be accumulated, packed in bags or baled, and held for such disposition as may be directed by the contracting officer."

on account of fixed profit at the rate of three-tenths of 1 per cent of the amount named as such profit, provided that in no case shall such deductions cause the fixed profit to be less than the sum of \$4,500 for each article.

It is also provided in such purchase order that Articles I, II, III, VI, and XI to XXII, both inclusive, as stated in contract Form No. 598, edition of November 3, 1917, will apply to this order. No provisions for extension of time are made except as such provisions are found in the form referred to.

3. On January 26, 1918, the purchase order of December 8, 1918, was supplemented by a contract on Form No. 598, proxy signed on behalf of the Government as follows: "Samuel McRoberts, Col., Ordnance Department, U. S. N. A., contracting officer, by Chas. N. Black, Lieut. Col., Ord., N. A." This contract follows the procurement order in respects here material and increased the maximum cost of the buildings to \$1,500,000. Article III thereof provides:

"Time being of the essence, the contractor will, if requested so to do by the contracting officer, use his best efforts to anticipate the foregoing schedule, and agrees to give the performance of this contract precedence over all work for parties other than the United States. The contractor shall not be responsible for delays caused by acts of war, \* \* \* or by storms, and the like, or by any act or default of the United States, or other cause beyond the control or without the fault of the contractor, without \* \* \* .

"It being understood and agreed that the deliveries of the articles as set forth in the foregoing schedule are contingent upon the ability of the contracting officer and the contractor to furnish the drawings and to procure the erection and equipment of the buildings afore-described, and the materials, labor and supplies, or anything necessary for the manufacture of such articles, within a period reasonably permitting the carrying out of the terms of the foregoing schedule."

Article IV, paragraph (b), in addition to providing for liquidated damages as stated in the purchase order, provides:

"That the contracting officer shall extend the time for delivery of any articles for a period equal to any delay or delays caused in his opinion by any act of the United States, or by \* \* \* storm, and the like, or other cause, beyond the control and without the fault of the contractor occurring during such time as the contractor may not be in default or before the expiration of any previous extension of the time for delivery of any articles, and no deduction from fixed profit shall be made for delay directly arising from any such cause."

Article V, paragraph (4) provides:

"The decision of the contracting officer *on all questions of the allowance and determination of cost and the payment thereof shall be final, except that either upon the completion of the contract by the contractor, or its termination by the United States, or whenever*

*claims of cost amounting in the aggregate to \$—— have been disallowed or determined adversely to the contractor by the contracting officer, the contractor may appeal to the Chief of Ordnance by filing one statement of claim which shall embrace all claims of cost previously disallowed or adversely determined, provided that all such claims shall be certified by an accountant designated by the contracting officer as being in their entirety the subject of expenditures of, or cost to, the contractor."*

Article VII provides that—

"In the event the contracting officer shall make any change in the drawings and specifications forming a part of this contract, the schedule of deliveries shall be extended for a period or periods equal to any delay that may be caused thereby."

Article XX provides:

"Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved at any decision of the Chief of Ordnance upon such reference, he shall have the right to submit the same to the Secretary of War, whose decision shall be final."

Among the schedules referred to and made a part of the contract is Schedule No. 3, a copy of a contract between claimant and George A. Fuller Co., bearing date of the original purchase order, December 8, 1917, for the construction of the required buildings and bearing the approval of the Ordnance Department, by W. H. Reed, captain, Ordnance. No time of completion is fixed in this contract, and it is clear from the testimony that such omission was intentional on account of the uncertainties of the times and the great haste with which the contract was entered into, coupled with the lack of definite plans or specifications.

4. On July 31, 1918, a formal supplemental agreement, to the contract of January 26, 1918, was entered into. Its only purpose being to increase the maximum cost of the buildings from \$1,150,000 to \$1,300,000. It provides in Article V thereof:

"Except as herein modified, all the terms and conditions of the contract dated January 26, 1918, shall remain in full force and effect."

5. On January 23, 1919, a second formal supplemental contract was entered into increasing the maximum cost to the Government of the buildings to \$1,705,279.70, containing a provision that the informal contract as theretofore amended shall remain in full force and effect.

6. On December 10, 1917, purchase order War-Ord. CS-105A was issued. It is signed by J. H. Rice, lieutenant colonel, Ordnance De-



partment, and provides for the manufacture by claimant of eleven 12-inch mortar carriages, model of 1918. It is recited in this order that the carriages ordered are in addition to those covered by purchase order CS-105, dated December 8, 1917, and that the additional order—

“Will be covered by the same specifications and conditons set forth in that order.”

Delivery of the carriages is to be made f. o. b. plant on or before December 31, 1918. The prices are fixed the same as in War-Ord. CS-105, at cost plus a fixed profit of \$6,000 per carriage, under the same conditons as specified in purchase order CS-105.

7. This additional purchase order CS-105A is covered by a contract dated May 13, 1918, signed on behalf of the Government as follows: “Samuel McRoberts, Ordnance Department, U. S. Army, N. A., Contracting Officer by Chas. N. Black, Lieut. Col., Ord., N. A.” Except as above stated and except also that it contains no building or equipment requirements this contract so far as here material is identical with the contract dated January 26, 1918, covering purchase order CS-105 above referred to.

8. On March 3, 1919, a formal contract was entered into between claimant and the Government in which it is recognized that contracts CS-105 and CS-105A were not executed by the Government in the manner provided by law, and that the supplemental agreements CS-105 dated July 31, 1918, and January 23, 1919, were executed by both parties in the manner prescribed by law. The contract of March 3, 1919, provides that upon its execution all work under contracts CS-105, as supplemental and amended, and CS-105A are terminated and suspended and that the contractor agrees to submit to the Secretary of War, in accordance with the provisions of the act of March 2, 1919, all claims arising out of the aforesaid agreements prior to March 3, 1919, reserving all rights of appeal. It further provides that the contractor shall proceed to manufacture or complete the manufacture of fifty-six 12-inch mortar carriages at prices stipulated, which are the same as fixed by the original contract, and that any extension of time is to be determined by agreement between the contracting officer and the contractor except as otherwise provided in matters not material here. This contract also provides in Article V that its execution—

“Shall not affect any right to liquidated damages, which may have accrued to the United States under the provisions of the agreements CS-105 and CS-105A, as though incorporated herein, nor shall it affect any right of the contractor to secure appropriate extensions of time for deliveries, allowance for delays, or refund of liquidated damages deducted by the United States.”

Article IX relieves the contractor from responsibility due to causes beyond his control and is in substance the same as the provisions contained in contracts CS-105 and CS-105A, but it contains no liquidated-damages clause.

Article XIII provides for the adjustment of claims and disputes. No time of performance is specified. This contract was an attempt to validate the prior contracts, which claimant thought to be invalid. (R-62.) It was entered into on the advice of the Cleveland district ordnance office.

9. Claimant is not a building contractor and has had no experience in such matters. The George A. Fuller Co. was called in by the Ordnance Department, and negotiations were entered into between the Ordnance Department and the George A. Fuller Co., which finally resulted in claimant's entering into the contract with the Fuller Co., dated December 8, 1918, incorporated in and made a part of the contract between claimant and the Government, dated January 26, 1918. It was the Ordnance Department and not claimant that estimated the cost and increased its estimates on two occasions as evidenced by the supplemental contracts. Claimants had practically nothing to do with the construction. It was to receive no profit whatever on the building contract, and, as a matter of fact, none upon the contract for the installation of the machinery, except upon such tools as it manufactured. Officers of the Ordnance Department approved of the Fuller Co.'s purchases, checked and receipted for the materials and labor, approved invoices, made out vouchers and forwarded them to the Ordnance Department. No itemized bills were furnished claimant, and it made no attempt to check the expense of construction. The checks in payment of the vouchers were forwarded by the Finance Division, Ordnance Department, direct to the Ordnance officer at claimant's plant, who presented them to claimant for indorsement, and, after being indorsed by claimant, the auditor forwarded the vouchers direct to the Fuller Co. Claimant was not consulted regarding, and exercised no control over, the construction work. In fact, claimant was a mere "straw man," so to speak, in the construction program.

In August or September, 1917, claimant had taken contracts for the manufacture of other carriages and other ordnance material amounting to practically \$4,000,000, and upon which contracts they were engaged, when the orders in question here were taken. The work then on hand consumed claimant's entire plant capacity. In fact, including commercial business for which claimant had contracts at the time it entered into the contracts out of which this dispute arises, claimant had outstanding contracts for work in double the capacity of its plant. Claimant was practically the only concern

in this country upon which the Government relied for the class of material it was producing. It was the understanding of all parties at the time the orders for the mortar carriages were accepted by claimant and the contracts of January 26, 1918, and May 13, 1918, entered into, that the carriages could only be manufactured within the required time in case the new plant was erected and in full operation "within a period reasonably permitting the carrying out" of the schedule of deliveries. (Article III, contracts CS-105 and CS-105A.)

The work of construction was begun by the Fuller Co. almost immediately after its contract was signed, but the size of the buildings, the amount of work to be done and the difficulty in obtaining materials extended the work far beyond the time originally contemplated as necessary for the completion of the buildings and their equipment with the necessary machinery.

The Government purchased direct about \$4,000,000 worth of machinery, the greater part of which was installed in the buildings erected by the Fuller Co.

At the time the first purchase order was issued, it was contemplated that the plant would be in 60 per cent production May 1, 1918, and in full production by June 1, 1918. The plant was not completed until after the armistice. On November 1, 1918, 97 per cent of the machinery had been installed. Included in the 3 per cent of machinery, which had not been installed, was one plainer, the absence of which reduced production 10 per cent.

During April, May, and June, 1918, none of the important machinery had been installed, and claimant was unable to utilize the new buildings to any extent for work upon contracts CS-105 and CS-105A during these months. During April, May, and June, 1918, claimant was directed by Lieut. Col. J. H. Rice, Ordnance Department, who had signed the original purchase orders, and Col. James B. Dillard, Ordnance, to devote all available facilities of the new plant to the construction of, 138 limbers, 80 transport wagons, and 1 16-inch howitzer mount. (R-39.)

During July, August, September, and October, 1918, by direction of Col. L. H. Campbell, the available facilities of the new plant were devoted to the manufacture of three 12-14-inch sliding railway mounts for Chilean guns, their spare parts, tools, and accessories, as it was desired to have them shipped overseas by October 8, 1918. By reason of the unprecedented severity of the weather during the winter of 1917-18 the construction program was delayed three months. Lack of power and inability to obtain tools was also responsible for some delay. Power arrangements were finally made by the Government, which procured power to be turned on on August 19,

1918. At this time only 60 per cent of the machine tools had been installed. On September 1 this percentage was increased 70 per cent, and on October 1 to 92 per cent. The United States furnished two-thirds of the tools and equipment. (R-41.) The contractor was delayed 165 days on account of delay by the Government in directing the use of the new plant for the manufacture of other ordnance material and by bad weather, the former cause being one for which the contractor is expressly relieved of responsibility, and the latter comes properly within the terms, "storms, or the like," and "or, other cause beyond the control or without the fault of the contractor." Thus, the date of beginning deliveries should be advanced from July to December, 1918, and the time in which to complete deliveries proportionately extended. During December, 1918, January, and February, and the first two days of March, 1919, the contractor slightly exceeded required deliveries, and then by virtue of an order from the Chief of Ordnance, claimant was required to operate upon a reduced schedule, which reduced production 40 per cent. (See record, pp. 37 to 45, inclusive.)

On account of the causes referred to, which were within the causes of delay, responsibility for which claimant was released by the terms of its contract, the time within which claimant should complete deliveries was extended 293 days. This extension was made by letter dated November 14, 1919, signed "R. H. Hawkins, Lieut. Col., Ord. Dept., U. S. A., Chief of Contract Section, by A. C. Hindman, major, Ord. Dept.," written by direction of Chief of Ordnance. The letter states that such extension had been duly allowed by the contracting officer. The extension was approved by S. J. Scovill, district chief of the Cleveland ordnance district, on a date not given; inspector of ordnance at claimant's plant, Maj. T. C. Dunlap, Ordnance, on June 5, 1919; by the head of the negotiating section, Lieut. Col. G. M. Barnes, August 20, 1919; and by the contracting officer, Maj. A. C. Hindman, Ordnance, on a date not given. Claimant had made application for this extension of time May 31, 1919, based on causes above referred to. The extension so granted, dated November 14, 1919, refers to contract MC-21170. This is the number of the formal contract dated March 3, 1919, which undertook to consolidate and validate the previous contracts. By this extension claimant had until October 23, 1919, in which to complete deliveries, and all deliveries were made within the extended time, the last carriage being delivered October 7, 1919. These have been paid for except as to the sum here in dispute.

10. Deductions of \$1,500 each were made from payments for the 56 carriages delivered from March 25 to October 7, 1919, on the basis of the liquidated damages provided for in the contracts, amounting

to \$84,000. A public voucher (Exhibit No. 1) for the amount so deducted was presented by claimant to the Auditor for the War Department, accompanied by a statement from the contracting officer to the effect that—

“No actual damages resulted to the United States on account of this delay in delivery, and no deductions should be made from these vouchers on account thereof.”

11. On January 31, 1920, while this claim was pending before this Board, the Auditor for the War Department disallowed claimant's application for refund of the liquidated damages deducted under contract MC-21170, dated March 3, 1919 (in reality under contracts 105 and 105A). The auditor states his reasons for disallowance as follows:

“Liquidated damages under contracts CS-105 and 105A having accrued and been deducted from amounts due from the United States to the Morgan Engineering Co., and the alleged causes of delay not being among the excusable causes named in said contracts, same is a proper charge against the contractor. These contracts, not being executed in the manner and form prescribed by law and the date of delivery having passed prior to the execution of the agreement dated March 3, 1919, are not modified by this latter agreement. Also, the agreement of March 3, 1919, was made without a valuable consideration moving from the contractor to the United States. Said claim is therefore disallowed.”

#### DECISION.

1. On account of the decision of the auditor, we are met at the threshold of this case by a question of jurisdiction. If the claim is based on formal contracts, the decision of the auditor is final. If the claim had its origin in informal contracts, then, as we shall presently see, this Board had original jurisdiction to determine such claims.

2. This Board agrees with the auditor that the contract of March 3, 1919, was executed without a valuable consideration moving from the contractor to the Government and for that reason is invalid. The Board also agrees with the auditor that the contracts upon which this claim arises were not executed as required by law.

3. The proxy-signed contract of January 26, 1918, War-Ord. 105, was amended by the formal supplemental contract of July 31, 1918, and by the formal supplemental contract of January 23, 1919. The first of these formal contracts provides that the proxy-signed contract of January 26, 1918, shall remain in full force and effect except as therein modified. The second supplemental contract continues in effect the proxy-signed contract of January 26, 1918, as modified by the formal contract of July 31, 1918. These supplemental contracts related only to the increased cost of the buildings. The effect of the



formal supplemental contracts was not to give formality to the prior informal ones, but to continue the informal contracts in effect as thus modified. The proxy-signed contract of May 13, 1918, was not thereafter modified except as the invalid contract of March 3, 1919, undertook to modify it.

4. Prior to the enactment of the act of March 2, 1919, the decision of the Auditor for the War Department until reversed by the Comptroller of the Treasury, as to claims arising in the War Department was final (sec. 425 U. S. Comp. Stats.), and his opinion is still final as to matters within his jurisdiction.

By section 1 of the act of March 2, 1919, the Secretary of War is given express authority—

“To adjust, pay, or discharge any agreement, \* \* \* that has been entered into in good faith during the present armistice and prior to November 12, 1918, by any officer or agent acting under his authority \* \* \* with any person, firm, or corporation for the \* \* \* production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes in connection with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made, or obligations incurred upon the faith of same by any person, firm, or corporation prior to November 12, 1918, and such agreement has not been executed in the manner prescribed by law, \* \* \*: *Provided*, That this act shall not authorize payment to be made of any claim not presented before June 30, 1918, \* \* \*: *And provided further*, That no settlement of any claim arising under any such agreement shall bar the United States Government through any of its duly authorized agencies, \* \* \*, from the right to review of such settlement, \* \* \*, if the Government has been defrauded, \* \* \*.”

Under the provisions above quoted the Secretary of War has jurisdiction to adjust informal contracts, and his determination is subject to review by agencies of the Government, such as the Auditor for the War Department, and the Comptroller of the Treasury, only if “the Government has been defrauded,” or, perhaps, in cases where the Secretary of War has wrongfully assumed jurisdiction on the ground that a claim comes within the act, when, as a matter of fact, it does not; in other words, when the Secretary of War has acted beyond the jurisdiction conferred by said act. It is held, therefore, that the claim is within the jurisdiction of this Board to determine, notwithstanding the previous adverse ruling of the auditor. (Op. Comptroller Warwick, Apr. 16, 1919, 25 Comp. Dec., 774.)

5. For another reason this Board has jurisdiction, namely, for the reason that the contract in question expressly provides that all doubts and disputes thereunder may be determined by the Secretary of War, whose decision shall be final.

In the case of Hydraulic Pressed Steel Co. and the Metals Product Co., decided October 14, 1920, 26 Comptroller's Decision, 275, 277, the comptroller stated that—

“It is well settled that where parties to a contract agree upon some one to determine a fact and provide that the determination shall be final and conclusive, such determination, when made, will not be reviewed in the absence of fraud or such gross mistake as to imply fraud appearing in the decision of the determining officer.”

The right of one designated by the parties to make final determination is also recognized in 12 Comptroller's Decision, 167; and 15 Comptroller's Decisions 812, 817, and by the Supreme Court of the United States in the case of *U. S. v. Gleason* (175 U. S., 588, 605).

6. Article IV of each contract provides:

“That the contracting officer shall extend the time of delivery of any articles for a period equal to any delay or delays caused, in his opinion, by any act of the United States, or by acts of war, \* \* \* or by \* \* \* storms, and the like, or other causes beyond the control and without the fault of the contractor occurring during such time as the contractor may not be in default or before the expiration of any previous extension of time for delivery of any articles, and no deductions from fixed profit shall be made for delays directly arising from any such cause.”

7. Article XX provides that—

“Except as this contract shall otherwise provide, any doubts or disputes which may arise as to the meaning of anything in this contract shall be referred to the Chief of Ordnance for determination. If, however, the contractor shall feel aggrieved by any decision of the Chief of Ordnance upon such reference, he shall have the right to submit the same to the Secretary of War, whose decision shall be final.”

8. The power of final determination in the Secretary of War as to doubts or disputes arising under the contract is a continuing one and is not cut off by the expiration of the time of performance or by full performance of the contract. Otherwise the result of the provision would fall far short of its purpose.

9. The fact that extension of time was granted after the time of performance fixed in the contract had expired does not render such extension any the less valid, since the extension was granted for causes occurring during the time when the contractor was not in default. (18 Compt. Decs., 710; 20 Compt. Decs., 325, l. c., 328; 26 Compt. Decs., 275, l. c., 278.)

It has been held, in construing a contract relieving the contractor from responsibility for delay due to the action of the Government “during performance of the contract,” that this term is broad enough to include the time until the contract was completed by de-

livery of the material contracted for. Liquidated damages, of course, can not be waived by a Government officer; but the allowance of an extension of time for causes permitted by the contract is not a waiver, but a mere compliance with its terms. (15 Compt. Decs., 812, 817; *Morse v. Transportation Co.*, 161 Fed., 99, 101; 26 Compt. Dec., 424. 426.)

10. It is therefore believed to be the duty of this Board, acting for the Secretary of War, to make a finding as to the matter in dispute.

11. It might well be doubted, under the terms of this contract, that time was really of its essence, in view of the provision in Article III that—

“It being understood and agreed that the deliveries of the articles as set forth in the foregoing schedule are contingent upon the ability of the contracting officer and the contractor to furnish the drawings and to procure the erection and equipment of the buildings aforescribed, and the materials, labor, and supplies, or anything necessary for the manufacture of such articles, within a period reasonably permitting the carrying out of the terms of the foregoing schedule.”

However, in the view we take of the matter, it is unnecessary to determine this question.

12. The contract provides for the construction and equipment by claimant of an additional plant, in which were to be manufactured the 80 mortar carriages contracted for. It was clearly the understanding of the Government that claimant could not comply with the schedule of deliveries unless the building was completed within a period reasonably permitting deliveries according to the schedule. It is not disputed that the plant was not fully completed until after the armistice. Prior to the 1st of July, 1918, none of the important machinery had been installed, and claimant was unable to utilize the new buildings to any extent for work upon its contract. During the months of April, May, and June what work it was able to do in the new plant was, by direction of the Ordnance Department, devoted to the manufacture of limbers, transport wagons, and howitzer. During July, August, September, and October, by direction of the Ordnance Department, the available facilities of the new plant were devoted to the manufacture of sliding rail mounts for Chilean guns, their spare parts, tools, and accessories, which the Government desired to ship overseas by October 8, 1918. These delays were clearly delays of the Government, the responsibility for which claimant is relieved by its contract.

13. The winter of 1917-18 was of unprecedented severity and resulted in delaying the building program for at least three months. This was due to “storms and the like,” and was certainly a cause be-



yond its control and without its fault. The contracting officer properly found that claimant was entitled to an extension of time of 293 days under the terms of its contract. It is evident that delays for the period of time equal to the extension given by the contracting officer were all due to causes "beyond the control or without the fault of the contractor" within the terms of paragraph (b), Article III, of the contract. Not only has the contracting officer acted as he had a right to do in extending the time for such a period as in his opinion the contract was delayed by reason of causes beyond the contractor's control, but the Chief of Ordnance has also acted in the premises as he is authorized to do under Article XX of the contract. While this action, as stated in the letter to claimant of November 14, 1919, was signed by Maj. Hindman, Ordnance Department, yet he acted by direction of the Chief of Ordnance, and his action in this respect is the action of his superior officer.

14. For the reasons stated it is the opinion of this Board that the action of the contracting officer and the Chief of Ordnance in extending the time for the completion of the contract is fully warranted under all the facts of this case, and since the carriages were all delivered by claimant to the Government within the extended period of time and accepted by the Government, that no liquidated damages accrued and that claimant is entitled to recover the balance of the purchase price.

#### DISPOSITION.

This Board will transmit this decision to the Claims Board, Ordnance Department, for appropriate action.

Col. Delafield concurring.

JUNE 5, 1920.

Case No. 2604.

*In re* CLAIM OF NEW YORK CENTRAL RAILROAD, WALKER D. HINES,  
DIRECTOR GENERAL OF RAILROADS.

1. **REMOVAL OF SIDETRACK CONSTRUCTED FOR GOVERNMENT USE—COSTS.**—Where claimant at the request of the Government and under a written contract providing for cost of installation, but silent as to removal, installed a sidetrack for Government use, authorized by the city of New York, by a grant to claimant, which required removal at claimant's cost, there arose under the circumstances and within the purview of the act of March 2, 1919, an implied obligation on the part of the Government to reimburse claimant the cost of removal of such sidetrack when same was no longer needed for Government purposes.
2. **CLAIM AND DECISION.**—This claim for \$5,919.16 is an appeal from the decision of the Claims Board, Transportation Service, and is presented upon the theory that the Government is obligated on an implied agreement to reimburse claimant the cost occasioned by the removal of a sidetrack. Held, claimant is entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$5,919.16 as amended by reason of an agreement alleged to have been entered into between the claimant and the United States within the meaning of the act of March 2, 1919.

2. Claim was filed June 30, 1919, and a hearing was had before a committee of the Claims Board, Transportation Service, Washington, D. C., February 24, 1920, and was disallowed by said board for the reasons:

(a) That formal contract for the construction of the tracks involved herein, whereby the Government agreed to pay claimant \$12,260.50 and did so, expressed the intent of the parties in regard to these contracts.

(b) That there was no express agreement that the Government should pay for the removal of the tracks.

(c) That the record fails to show the facts and circumstances that would give rise to an implied agreement on the part of the Government to pay for the removal of the tracks and restoration of the streets.

3. On this appeal a hearing has been had by the Board of Contract Adjustment.

4. On June 4, 1917, Hon. Newton D. Baker, Secretary of War, addressed a letter to the mayor of New York City, N. Y., which reads:

"I have the honor to inclose a copy of letter from the officer in charge, medical supply depot, New York City, dated the 29th ultimo, respecting certain railway trackage that would materially promote the receipt and shipment of medical equipment for Army use, and to request that, if the matter of the desired additional trackage is within your province and you deem its provision compatible with the interests under your care, you give it your favorable consideration.

"An identical letter is this day addressed to the governor of New York."

5. On June 8, 1917, the corporation of the city of New York granted the license as requested on the petition of the Secretary of War. It ran to the New York Central Railroad Co. as grantee, but sets forth that the consent is granted for the emergency purposes during the period of the war only and that the track authorized is for the use of the United States Government in connection with the war.

6. Paragraph 3 of the resolutions of the board of estimate and apportionment of the city of New York granting the license reads:

"Upon revocation or termination by limitation of this consent, the said grantee shall, at its own cost, cause the said tracks and all appurtenances thereto to be removed, if required so to do by the city of New York or its duly authorized representatives, and all that portion of said street affected by this consent to be restored to its proper and original condition. If the said track shall not be required to be removed, it is agreed that it and its appurtenances shall become the property of the city of New York."

7. Paragraph 5 provides in part as follows:

"The grantee shall pay the entire cost of—

"(a) The construction, maintenance, and removal of the track.

"(b) The protection of all the surface and subsurface structures which shall in any way be disturbed by the construction or removal of the track.

"(c) All changes in the sewer, water pipes, or other structures made necessary by the construction or removal of the track, including the laying or relaying of drains, pipes, conduits, sewers, or other structures.

"(d) The placing, replacing, or restoring of the pavement and sidewalks in said street which may be required or distributed during the construction or removal of the track.

"(e) Each and every item of the increased cost of any future substructure caused by the present of the track.

"(f) The inspection of all work during the construction or removal of the track, as herein provided, which may be required by the president of the borough and the commissioner of water supply, gas, and electricity."

8. Under date of July 13, 1917, First Lieut. H. S. Baketel, Medical Reserve Corps, United States Army, of the medical supply depot, New York, wrote the officer in charge, medical supply depot, New York, with reference to the proposed spur track in Morton Street, in part as follows:

"Pursuant to your instructions to obtain from the city of New York and the New York Central Railroad Co. the permission necessary to have a spur track laid from the present railroad freight tracks on West Street to our new warehouse on Morton Street, I took the matter up with the general superintendent of the railroad and with the city authorities.

"On June 6 I appeared before the mayor of New York and the board of estimate in reference to the request of the Secretary of War granting the Secretary's request with the usual conditions. (See copy of resolution marked 'A.')

"The legal representative of the railroad then advised me that his principals were ready to commence work as soon as Mr. Ira A. Place, vice president in charge of legal matters, received written instructions from some one in authority in the War Department that the United States Government would pay its proportionate share of the expense in installing the track. He said the charge would be made in accordance with the railroad's custom of charging private business concerns.

"The railroad has already completed its survey of the streets, and, I am informed by the superintendent, now stands ready to commence work upon the receipt of the proper authorization."

9. On July 9, 1917, F. M. Hartsock, lieutenant colonel, medical supply officer, New York, wrote to Mr. Ira A. Place, vice president, New York Central Railroad Co., New York, stating that the Secretary of War by telegram to him had approved the request for the spur track granted in accordance with the resolution passed by the board of estimate and apportionment on June 8, 1917, and in view of this approval, asking the New York Central to furnish the city authorities with certificate of acceptance of the resolution.

10. In reply to this letter, Mr. Ira A. Place, vice president of the New York Central Railroad Co., wrote Lieut. Col. F. M. Hartsock, Medical Corps, United States Army, on July 9, 1917, that the New York Central was accepting the grant from the city and that it was the railroad's understanding that the Secretary of War has been fully advised of the conditions of the grant.

11. On July 24, 1917, Lieut. Col. Hartsock, wrote Mr. Place, vice president of the New York Central, the following letter which reads in part:

"1. Upon inquiry I find that all the details have been settled for the installation of the spur tracks, which is to connect your railroad on West Street with our warehouse on Morton Street. We are advised that the only thing now standing in the way is the delivery of

the frogs and track, which matter has been turned over to your purchasing agent.

"2. May we ask you to advise your purchasing agent to expedite this as rapidly as possible, as we are exceedingly anxious to have this track laid most promptly?"

12. On July 7, 1917, an agreement was entered into between the New York Central Railroad Co. and the city of New York which provides in part:

"In consideration of the premises and of the consent, right, or privilege in said resolution contained, the party of the first part hereby accepts such consent and promises, covenants, and agrees on its part and behalf to conform to, abide by, and perform all the terms, conditions, and requirements in said resolution fixed and contained, and further promises, covenants, and agrees to hold the city of New York harmless from all damages to persons or property which may result from the construction, use, maintenance, or operation of said structure."

13. Under date of July 12, 1917, a proxy-signed contract No. 3964 was entered into between the Government, acting through Col. Thomas H. Slavens, Quartermaster Corps, United States Army, and the claimant.

Article I of said contract reads:

"That the contractor shall furnish the supplies and services, either or both, specified below, in the manner, at the rates or prices, at the place or places, and at the time or times during the period commencing with the 12th day of July, 1917, and ending with the 31st day of December, 1917, as follows: Material and labor necessary for the laying of a spur track from the New York Central Railroad freight track on West Street to medical supply warehouse on Morton Street, New York City, at a total cost to the United States of twelve thousand two hundred sixty dollars and fifty-one cents (\$12,260.51)."

14. While the contract is dated July 12, 1917, it is clear from the record and the testimony of this case that it was not executed by the railroad company until about December 17, 1918, and that the claimant was not paid until after that date for the installation of the said spur track.

15. This claim is for the cost of removal of the said track. The work of the removal of the track was commenced October 30, 1919, and completed November 19, 1919.

#### DECISION.

1. The license to the New York Central Railroad Co. to lay the track in question was granted by the city of New York on the personal application of the Secretary of War. The company has, in

all respects, acted in accordance with the direction of Government officials. The track was laid for emergency purposes of the War Department.

2. While there does not appear to have been a specific understanding as to the amount which the Government should pay in the matter, it was, nevertheless, clearly contemplated that the Government was liable to make reimbursement to the railroad to some extent.

3. The railroad, in compliance with the request of the Government, accepted the license and the terms upon which it was issued, one of which was to construct the track and another to remove it at the request of the city. These terms were well known to Government officials. We find from the above circumstances an agreement by the Government to reimburse the railroad for its expense incurred in the construction and removal of the track, subject, of course, to any subsequent modification which the parties might make.

4. Negotiations as to the payment of the expense of constructing the track commenced apparently in July, 1917, and continued down to December, 1918, when a contract was finally executed whereby the Government agreed to pay \$12,260.51 as its share of the cost of construction, the railroad furnishing the track metal.

5. This agreement defines the obligations of the Government so far as the construction of the track is concerned.

6. It does not seem to us, however, that this agreement merged and included the entire understanding of the parties. There is nothing expressed in the correspondence or in the facts to that effect. The removal of the tracks was, during the greater part of the time, not contemplated (the war not having terminated), and the expense of removal would have been impossible to ascertain accurately in any event. We find, as stated above, that the Government was under an agreement to pay the expense of removal, and we do not find that the claimant has waived or released its right to receive reimbursement for the expense now claimed.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, 1919, Purchase, Storage and Traffic Division.

Col: Delafield and Mr. Hopkins concurring.

JUNE 5, 1920.

**Cases Nos. 737 and 748.**

**In re CLAIMS OF MILL PRODUCTS CORPORATION AND OMNIA COMMERCIAL COMPANY.**

- 1. CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY.**—Where the claimants had contracts for the purchase of steel plates, and the vendor was unable to make deliveries because of the control exercised by the Government over the steel industry, which prohibited the vendor from filling the contracts, this was not a taking of private property of the claimants, for if anything was taken it was the property of the vendor.
- 2. CONTRACT EXEMPTING LIABILITY.**—Where the contract of sale provided that the vendor should not be responsible for damages caused by Government control or interference, the Government is not liable to the claimant for any such loss when there is no agreement, express or implied, between it and the claimants.
- 3. NO LOSS BY GOVERNMENT ACT.**—Where it appears that the decline in price causing the loss occurred prior to and independent of Government control there is no liability on the Government.
- 4. CLAIMS AND DECISION.**—Claim under the act of March 2, 1919, for \$2,125,500, in case No. 737 and for \$1,079,500 in case No. 748 loss on steel plate. Held, claimant not entitled to recover.

Mr. Montgomery writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. These cases arise under the act of March 2, 1919. Statement of claim, Form B, has been filed in each case under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, in case No. 737 for \$2,125,500 and in case No. 748 for \$1,079,500, by reason of an informal agreement alleged in each case to have been entered into between the United States and the claimant.

2. These claims relate to transactions so intimately connected that it was deemed necessary to hear both cases at the same time, and a single opinion will suffice for both. The following findings of fact and decisions are so phrased as to apply to each case separately:

3. In the month of May, 1917, Messrs. Robert P. Tucker, Charles Dannen, Jacob Meurer, Charles B. Eddy, and Ralph F. Watney, who, for the sake of convenience, may be termed "associates," owned a



blooming mill, including a 6,000 horsepower electric-drive equipment and a quantity of structural steel, all in storage, part of it at Chattanooga, Tenn., where it was proposed to erect the mill. This was to be done in cooperation with the Allegheny Steel Co., which was to furnish a nucleus for the working force of the proposed organization.

4. Owing to the general unsettlement at that time the associates concluded to abandon the erection of the mill and to exchange it for a quantity of steel ship plates and tank plates. Certain written contracts are presented as evidence of the arrangement concluded between them and the Allegheny Steel Co., whereby the associates were to receive, in exchange for their mill, 43,000 tons of ship plates and 15,000 tons of tank plates to be delivered in the year 1918 in approximately equal monthly installments, this being the estimated tonnage capacity in 1918 of the mill then proposed to be erected. The price to be paid for the plates by the associates was primarily based on the then market value of plate less the then market value of the equipment.

5. Under date of May 14, 1917, the Allegheny Steel Co. made a written offer to Mr. Dannen for the associates to sell 18,000 tons of basic open-hearth sheared-steel ship plates, in equal monthly installments, during 1918, at 6.25 per 100 pounds, the buyer to establish in a bank an irrevocable credit covering the value of the tonnage and payment to be made on presentation of invoices with drafts and bills of lading attached. The letter stated: "All agreements contingent upon strikes, accidents, and other causes beyond our control." This offer was duly accepted by telegram and letter of May 17, 1917, and letters of credit appear to have been obtained at certain New York banks.

6. This agreement was thereafter reduced to a formal contract and was assigned to the Omnia Commercial Co., which, in turn, executed a contract, under date of May 19, 1917, with the Vulcan Steel Products Co., and thereby agreed to sell to the latter 18,000 tons of basic open-hearth sheared-steel ship plates, at \$9.25 per 100 pounds, to be delivered during 1918 in equal monthly installments. This contract required that letters of credit be furnished by the Vulcan Steel Products Co. for the purchase price of the contract.

7. The contract recited that the purchaser was aware of the fact that the seller had in turn engaged with the producer to supply irrevocable credits for the materials, and that the seller would rely upon credits so to be arranged by the purchaser as a basis of supplying the seller's own credits to the producer.

8. Mr. Tucker testified:

"We did not quite work out our final arrangement of that as to the turning over of the mill; but, in view of the fact that we had



gotten to a specific point in that, they agreed to let us have 15,000 tons of ship plate. Looking to the closing of the final general deal, by reason of, and in consideration of, the fact that we were going to turn this mill equipment over to the Allegheny Steel Co., they made us a reduction in price to counterbalance the turnover of the plant and equipment."

9. Under date of June 15, 1917, a further contract was made by certain of the associates designated "vendors" with Messrs. Sheldon and Campbell, officers of the Allegheny Steel Co., designated as "purchasers," whereby the vendors agreed to sell their blooming mill, 6,000-horsepower reversible motor, their equipment, 1,363 tons of structural steel, and certain contracts at a consideration of \$500,000.

10. A further contract was executed bearing the same date, June 15, 1917, between Messrs. Sheldon and Campbell, designated "vendors," and the associates, designated "purchasers," referring to the contract lastly above described and providing for the sale to the purchasers by the vendors of 25,000 tons of ship plates at  $7\frac{3}{4}$  cents per pound and 15,000 tons of tank plates at  $6\frac{3}{4}$  cents per pound, the considerations for same to be protected and paid for by the establishment of certain irrevocable credits.

11. The following provision is included in the contract:

"The first parties shall not be liable for any delays, losses, or damages caused by fire, differences between employees and employers, executing the contract of which this is an exhibit, accidents, Government seizures or stoppages, or contingencies beyond the control of the first parties. Any of such causes shall be sufficient reason for any delays in the performance of the provisions of said contract caused thereby."

12. The rights of the purchasers under the contract last mentioned were assigned to the Mill Products Corporation and it is said that the rights of the vendors were assigned to the Allegheny Steel Co.

13. There was at first some doubt as to whether all of the associates would be interested alike in both contracts, and two corporations, Omnia Commercial Co. and the Mill Products Corporation, were organized that one corporation might hold the 18,000-ton contract and the other the 40,000-ton contract. It was subsequently determined that all the associates should share in both contracts, and the associates are the sole officers, directors, and stockholders of the two corporations. The corporations were used simply for the convenience of the parties.

14. Almost immediately the Mill Products Corporation sold to the Vulcan Steel Products Co., by written agreements, 7,500 tons of ship plates at  $10\frac{1}{2}$  cents per pound and 5,000 tons of tank plates at  $9\frac{1}{4}$  cents per pound. It is stated that by further oral agreements sales were

made by the Mill Products Corporation to the Vulcan Steel Products Co. of the remainder of the 40,000 tons of plates covered by this contract. All of the contracts, however, contain provisions in substance the same as the one quoted in paragraph 11, *supra*, providing that the seller shall not be liable for any delays, losses, or damages caused by strikes, Government seizures or stoppages, or contingencies beyond the control of the vendors, and that any of such causes shall be sufficient reason for any delays in the performance of the provisions of said contract caused thereby.


15. Early in August, 1917. Mr. J. Leonard Replogle was appointed director of steel supply. He acted at first under the General Munitions Board of the Council of National Defense. Thereafter the War Industries Board was organized and Mr. Replogle was responsible for the steel supply and distribution under Mr. Bernard M. Baruch of that board. Prior to March 4, 1918, the General Munitions Board and its successor, the War Industries Board, had only advisory powers, but on March 4, 1918, the President conferred upon the War Industries Board what its members regarded as absolute authority.

16. Mr. Replogle in his official capacity ascertained the needs of the Government for steel and so regulated production as to meet these needs as far as possible. Thus, he had practical control of the steel industry from the outset, because through priorities he could exercise such control, refusing to give a concern coke or other materials unless it applied its production to war necessities.

17. The Allegheny Steel Co. and the Vulcan Steel Products Co. sought permission to have the contracts of the Omnia Commercial Co. and the Mill Products Corporation carried out, but this Mr. Replogle declined to permit. His recollection is that these contracts were called to his attention in September or October, 1917.

18. Meanwhile the price of steel plates had been greatly reduced. The steel manufacturers, believing that their prices were too high, brought them down voluntarily. On September 24, 1917, the price of plates was fixed at 3½ cents a pound. It does not appear that claim was made at any time by the Omnia Commercial Co., or the Mill Products Corporation, that they had rights to the fulfillment of their contracts. Mr. Sheldon, of the Allegheny Steel Co., brought up the matter with Mr. Replogle at different times over a period of probably three or four months. He objected very strenuously to Mr. Replogle's instructions and the latter told him once that if he executed that contract he would take over the company's plant. That was prior to March 4, 1918.

19. The Japanese had been bidding for steel plates and were paying 15 cents a pound. Mr. Replogle says he knew of sales at over



16 cents a pound. An embargo was placed, however, on shipments of plates to Japan.

20. The control exercised by the board, of which Mr. Replogle was a member, extended over the entire steel-plate industry of the country. The Government's need for steel plates was more pressing than for any other steel product, and there were thousands of contracts of this character which were interfered with. The manufacturers understood that whether or not the War Industries Board possessed the requisite power to enforce its direction, the Government had ample powers, and that such powers would be exercised if needed. Hence, the manufacturers yielded to the demands of the War Industries Board without requiring it to exercise compulsion.

#### DECISION.

1. This claim is for compensation under the act of March 2, 1919, by reason of that clause of the fifth amendment to the Constitution of the United States which declares, "Nor shall private property be taken for public use without just compensation." The claim is based on the claimant's contract with the Allegheny Steel Co. for the purchase of steel plates and not upon the contracts for the sale of steel plates to the Vulcan Steel Products Co. The facts show, however, that the actual loss upon the contract with the Allegheny Steel Co. occurred by reason of the drop in the market price of plates from  $7\frac{3}{4}$  cents to  $3\frac{1}{4}$  cents per pound before any governmental interference occurred.

2. Even if it be assumed that claimant suffered a loss in consequence of the Government's assumption of the control over the manufacture and distribution of steel plates, the claimant could not recover without showing that its private property was taken for public use. If anything was here taken for public use it was the product of the Allegheny Steel Co., which it had contracted to sell to the claimant. Any obligation on the part of the Government for such taking would be an obligation on its part to the Allegheny Steel Co. which in turn would be liable to the claimant, if the contract between it and the claimant established such liability.

3. By the express terms of the contract between the claimant and the Allegheny Steel Co. claimant could collect no damages for the steel company's delay in performance caused by Government interference. The claimant, accordingly, suffered no loss thereby save one which it anticipated, as appears by the express terms of its contract, and for which it stipulated it would ask the other party no damages. It could not, merely by stipulating to relieve the Alle-

gheny Steel Co. of this damage, fasten the same upon the Government.

4. The nature of the claim may be illustrated by assuming a contract more simple in terms, but precisely the same in principle. Suppose the claimant had contracted with a railroad for the shipment of all the steel claimant should produce in a year at a freight rate of \$10 per ton, with a stipulation that if the Government should raise the freight rate, the railroad should not be required to ship at \$10 per ton. If the Government thereafter raised the freight rate to \$15, would the claimant be entitled to recover the additional \$5 per ton from the Government? The absurdity of the proposition seems a sufficient answer to the question. It is not perceived that there is any difference in principle between such a supposititious case and the case on which the claimant seeks to recover.

5. Had the Government seen fit so to do, it might have taken the claimant's contract in order to compel delivery to itself thereunder of the steel plates contracted for. This would have constituted, no doubt, a taking of private property for public use. But this the Government did not do. If it took the steel at all, it took it directly from the Allegheny Steel Co., making no use whatsoever of the claimant's contract with that company. There was clearly no taking from the claimant of private property for public use.

#### DISPOSITION.

1. Final order will issue denying relief to the claimant.  
Col. Delafield and Mr. Price concurring.

JUNE 5, 1920.

Case No. 2438.

*In re* CLAIM OF TRUSCON STEEL CO.

1. **SUBCONTRACTS—COMMITMENTS.**—Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction and this includes interest and storage charges, where the delay in payment and deliveries was the result of Government action.
2. **HANDLING CHARGES.**—These can not be allowed, as the only handling done was to load the material on cars and the contract provided f. o. b. cars.
3. **CLAIM AND DECISION.**—Claim under General Order 103 for \$227.40 commitments. Held, claimant entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under General Order 103. It comes before this Board on appeal from a decision of the Claims Board, Construction Division, which treated it as a class A claim under the act of March 2, 1919. The record does not disclose sufficient facts to bring the claim within the jurisdictional requirements of the act of March 2, and the claim should be treated as though presented under General Order 103.

The claim involves the question whether charges for storage, handling, and interest due to delays in the performance of a subcontract as a result of the acts of the Government are proper cost commitments to be allowed a prime contractor under the circumstances in this case. The claim is presented in the name of the subcontractor. It amounts practically, however, to a request for a determination of the obligations of the prime contractor to the subcontractor in the above respects.

STATEMENT OF FACTS.

1. On the 21st day of September, 1918, the United States Government, Construction Division, entered into a formally executed contract with Val Jobst, jr., and George J. Jobst, a partnership doing business under the name of Jobst & Sons, to furnish in the shortest possible time labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the enlargement of the plant of the Holt Manufacturing Co., at East Peoria, Ill.

Article II of said contract provides as follows:

*“Cost of work.*—The contractor shall be reimbursed in the manner hereinafter described for such expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.

*“(b)* All subcontracts made in accordance with the provisions of this agreement.”

2. For certain steel sash required by Jobst & Sons for performing the above contract with the Government, the claimant company submitted to Jobst & Sons bids acceptable to that firm. On November 26, 1918, the Construction Division, through R. C. Marshall, jr., brigadier general, United States Army, in charge of Construction Division, by C. M. Foster, captain, Quartermaster Corps, issued a proxy-signed requisition order No. 27, directed to the claimant company, authorizing and directing said company to proceed with the immediate production of steel sash for enlargement of the plant of the said Holt Manufacturing Co., at East Peoria, Ill. The requisition order recited that the price quoted as to be f. o. b. Youngstown, Ohio, on settlement terms of “30 days net.” It further recited “Confirmation and payment of this order will be made by V. Jobst & Sons,” and directed that the material be consigned to the United States constructing quartermaster, account V. Jobst & Sons, Holt Manufacturing Co., East Peoria, Ill. Jobst & Sons confirmed this order and the claimant company immediately began the manufacture of materials called for in said requisition.

3. On January 2, 1919, the Construction Division wired the claimant to suspend all action and make no further shipments on said requisition order No. 27, dated November 26, 1918. Material, at the time of this suspension notice, had about all been completed, but none had been shipped.

4. On June 7, 1919, the Government reinstated the original requisition order of November 26, 1918. The reinstated requisition order was signed “R. C. Marshall, jr., brigadier general, United States Army, by C. M. Foster, captain, Quartermaster Corps,” and read in part as follows:

Job: Holt Manufacturing Co., E. Peoria.

Supplemental authorization. Date, June 7, 1919. To req. No. 27 of Nov. 13, 1918.

File No. 411.5 CR MT (Holt, E. Peoria).

From: Officer in charge Construction Division.

To: Truscon Steel Co., Woodward Bldg., Washington, D. C.

Subject: Steel sash.

You are hereby authorized to reinstate req. No. 27, dated Nov. 13, 1918, calling for steel sash, and ship at once all material complete as called for on original requisition. Same shipping and billing instructions to apply.



Amount due vendor, \$3,610, which is arrived at as follows:

Amount of original order-----	\$3, 560. 00
Handling and rehandling charges-----	50. 00
Total-----	3, 610. 00

Jobst & Sons confirmed this reinstated requisition order, and the claimant shipped the material and received full payment therefor on the 25th day of September, 1919.

5. The claim is presented in two items. The first item is for \$139.43, interest on \$3,560. Interest on this item is claimed from February 1, 1919, the date alleged by claimant upon which the material would have been paid for if the original requisition order had not been suspended, to September 25, 1919, the date upon which payment was actually made. The second item is for outdoor storage from February 1, 1919, to June, 1919, and for rehandling charges on this material to February 1, 1919. This item for storage and rehandling charges is therefore made to run from February 1, 1919, until June, 1919, the approximate shipping date of said material.

6. Between January 2, 1919, and June 7, 1919, negotiations were instituted by the Government with a view either to adjusting claimant's subcontract or reinstating the order and redirecting shipment. These negotiations were pending throughout this period and finally resulted in the reinstatement of the order.

7. No final adjustment of Jobst & Sons contract has yet been reached, and the question is whether the above items of claim may be charged by Jobst & Sons as cost commitments. The facts in the case are not disputed.

#### DECISION.

1. Under its contract of September 21, 1918, with Jobst & Sons the Government obligated itself to reimburse the prime contractor for the actual net expenditures incurred under all subcontracts made in accordance with the provisions of said prime contract. Claimant was a subcontractor of Jobst & Sons, and the provisions of the prime contract in this respect seem broad enough to cover as a cost commitment expenditures such as these claimed herein to the extent that they may be due to the act of the Government. It sufficiently appears that the claimant as a subcontractor was justified in accepting the Government's notice of January 2, 1919, as a suspension of the prime contractor's obligations to receive shipments from claimant and to pay for them in 30 days and of claimant's right to ship and be paid in 30 days. Claimant should therefore not be charged with unexpected expense which its prime contractor would not have inflicted on it but for the action of the Government itself. The evidence also justifies the conclusion that claimant was justified in

holding the materials on hand for the time it did and was not guilty of unreasonably increasing the cost to the Government by so doing. In our judgment, the items of this claim are such as a court of law would allow recovery for in a suit by claimant against its prime contractor, Jobst & Sons, because when the Government suspended shipments under the original requisition order on January 2, 1919, claimant had at that time all its material completed and was entitled to make shipment and receive a 30-day settlement. Shipment and settlement was prevented by the action of the Government and claimant's capital, representing the value of that material, was tied up and idle. This principle, however, does not apply after the date of June 7, 1919, when the Government reinstated the original requisition. Upon such reinstatement the obstacle to the 30-day settlement was removed and it then became the duty and lay within the power of the prime contractor to make settlement within 30 days, and consequently of claimant to make shipments. Any delay in settlement thereafter is therefore not the fault of the Government.

2. The Claims Board in arriving at an adjustment of the prime contract with Jobst & Son may, therefore, allow the following as proper items of cost commitment:

(a) Such amount of interest on the cost to claimant of the materials stored by it as claimant might be able to recover in a court of law against Jobst & Sons not exceeding the lawful and customary rate for a period beginning 30 days from the date of notice of termination of the original requisition, viz, January 2, 1919, and ending on the date of the order reinstating such requisition, viz, January 7, 1919.

(b) An amount representing the reasonable and customary charge for outdoor storage upon said material from February 1, 1919, to the said date of reinstatement, June 7, 1919. Storage covering all periods prior to February 1, 1919, has already been paid to claimant.

3. The item of claim covering handling charges is denied. All handling charges up to February 1, 1919, have been paid claimant and after that date the only charges for that purpose were for loading on cars. This last charge is not proper in view of the fact that the requisition order called for material f. o. b. cars.

#### DISPOSITION.

1. The claim, with all papers, will be forwarded to the Claims Board, Construction Division, for appropriate action in accordance with this decision.

Col. Delafield and Mr. Bowen concurring.



JUNE 8, 1920.

**Case No. 10.**

*In re* **CLAIM OF UNITED STATES INDUSTRIAL CHEMICAL CO.  
(REHEARING).**

1. **AMBIGUITIES—PAROL EVIDENCE.**—All prior and contemporaneous negotiations are presumed to have been merged into the written contract embodying the subject matter of such negotiations, however, parol evidence may be received to explain the real intention of the parties as to any terms of the contract which are ambiguous, provided such evidence may not be admitted for the purpose of endeavoring to create an ambiguity and so ingrafting upon the contract new stipulations nor to contradict those that are plain.
2. **MISTAKE—REFORMATION.**—While a written contract may be reformed on account of mutual mistake of the parties, evidence to justify such reformation must be clear and cogent and must relate to a mistake as to a past or present fact and reformation will not be justified on evidence of a mistake as to future happenings; hence evidence as to a mistake in calculating the future price of an article is not such a mistake as comes within the rule stated.
3. **SUSPENDED CONTRACT—MAXIMUM RECOVERY LIMITED BY CONTRACT PRICE.**—On the settlement of a suspended contract for the manufacture of articles, the contract limiting the total cost in case of full performance, the amount which the claimant may recover in settlement of part performance can not exceed the maximum amount to which claimant would have been entitled under the terms of the contract in case it had been fully performed, except where damages for breach by the Government are included.
4. **CLAIM AND DECISION.**—Claim for \$707,131.71 under General Order No. 103 for additional compensation for acetone furnished the Government and for loss of material purchased to be used in the manufacture of acetone. Held, on rehearing, claimant entitled to recover in part.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is a claim presented in accordance with General Order No. 103, War Department, 1918, and is for \$707,131.71, under the following circumstances:

On January 25, 1919, the claimant filed a petition praying for an adjustment of its contract No. 2425, and its supplemental contract No. 2425-1. On May 1, 1919, the claimant filed its supplemental and amended petition claiming \$894,619.20. There is appended to the

said supplemental petition copies of the claimant's original and supplemental contract and a 10-page exhibit showing its cost of production of acetone from January 1, 1917, to June 30, 1917, constituting a tender for and the basis of contract No. 2425. At the request of the attorneys for the claimant there was held an informal conference on May 1, 1919, between the attorneys and representatives of the claimant and the Board of Contract Adjustment to discuss the procedure to be followed, and the power of the Board to grant relief. After this conference the claimant's attorneys presented a brief.

2. On July 2, 1919, an opinion was filed by this Board denying the claimant any relief, on the grounds of the lack of jurisdiction. This opinion is carefully prepared, and contains a summary of the contentions set forth by claimant's amended petition, and the points raised thereby as follows:

"When we came to examine some of the items which the petitioner sets out as its total cost, we find that some of these items are in the nature of damages claimed by the petitioner, resulting from an alleged breach on the part of the Government of the stipulations in said contracts binding upon the Government.

"It is alleged (a) that incidental to and as a part of the negotiations certain representations were made and conditions agreed upon to which the resulting contract was subject, and in the supplemental petition there are set out 26 'informal agreements and mutual understandings of the parties and negotiants of the contract,' and it is alleged that these conditions have not been fulfilled by the Government; (b) it is further alleged that, contrary to the terms of Article XXI, the Government has failed to lend the contractor effective assistance to enable it to procure raw materials and supplies and has failed to furnish effective priority orders; and (c) that as a result of these breaches of its obligations by the Government the contractor was unable to produce acetone until the middle of March, 1918, whereas if the Government's obligations had been kept production would have commenced in January, 1918; that the winter months, being the most favorable for the production of acetone, were thus lost through the Government's breach of its obligations, and therefore the cost of manufacturing the acetone was increased by the failure of the Government to keep its obligations and without the contractor's fault and to its detriment and damage; (d) another element of damage, amounting to \$69,473.11, is set out in the supplemental petition; it is alleged that certain verbal assurances were given the contractor that the Government would procure for the contractor the necessary saturating or restoration vinegar at a price not to exceed ten (10¢) cents per gallon; that the Government failed to keep this collateral obligation, and that as a result thereof the contractor was compelled to manufacture such vinegar at an excess cost of \$69,473.11; (e) finally, it is alleged that the 'act of the Government in breaking its contract' has deprived the contractor of the possibility of delivering the acetone at a price approximating the maximum and of earning the full profit agreed upon.

"The question, therefore, presented for the decision of the Board is whether the Secretary of War, or the Board of Contract Adjust-

ment, has the power, in adjusting and settling a validly executed written contract, terminated when it is 89.7 per cent completed, to exceed the maximum amount authorized by the contract to be paid to the contractor, when such excess is due—

“(a) To the breach by the United States of collateral and incidental agreements not made a part of the written contract; and

“(b) To the breach on the part of the Government of obligations laid upon it by the contract; and

“(c) To the act of the Government in ‘breaking’ contract before its completion.”

The decision itself raises two points, viz:

1. “Can the Board of Contract Adjustment in settling a validly executed written contract compensate the petitioner for breaches of incidental and collateral obligations alleged to have been made by the contracting officers?”

2. “Can the Secretary of War, or the Board of Contract Adjustment, in settling a validly executed written contract compensate the contractor for damages resulting from breaches by the United States of obligations laid upon the Government by the terms of the written contract, and also for damages growing out of the breaking of the contract by the Government, especially when such damages, together with other items, make the total compensation exceed the maximum prescribed by the contract?”

Under the first heading the decision states:

“In this case, after the contract had been partially performed, it was modified in some particulars by a contract in writing. If, as petitioner alleges, there were other terms binding upon the parties which were not inserted in the original contract, the supplemental contract was the proper place for the insertion of such terms; and the execution of the supplemental contract without the incorporation of the collateral agreements would seem to preclude the petitioner from setting up any such collateral agreements as a basis for a claim before the War Department.”

Under the second heading the decision carefully reviews the authorities on the power of the Secretary of War to allow unliquidated damages and concludes as follows:

“From the case of *Wm. Cramp & Sons Ship and E. B. Company v. U. S.* (216 U. S. 494) we may conclude that a contractor's claim for extra work caused by the United States over and above the amount stipulated in the contract is a claim for unliquidated damages which the Secretary has no jurisdiction to entertain. From *Dennis Case* (20 Ct. Cl. 119) we may conclude that damages founded on neglect or breach of obligations contrary to the terms of a contract (other than for nonpayment of money due for work done, or material furnished) are unliquidated claims and not subject to settlement by the administrative officers of the Government. From the *Brannon Case* (20 Ct. Cl. 220) we may conclude that damages for breach on the part of the United States of a contract involving loss of time of hands employed by a claimant, loss of materials destroyed by rain owing to failure of the United States to furnish other material, and loss of profits resulting to a claimant by reason of breaches by the Govern-

ment are not within the jurisdiction of the Secretary of War to adjust, since they are unliquidated. From the *McClure Case* (19 Ct. Cl. 173) we may conclude that where damages are claimed beyond the agreement such a claim is for unliquidated damages for breach of a contract which the Secretary of War has no jurisdiction to entertain.

"Since, in this case, petitioner is making a claim for 'damages beyond the agreement,' since his claim is in part for damages caused by the alleged failure of the United States to carry out stipulations made by the Government, and in part for damages flowing from the act of the Government in 'breaking' the contract; and since a portion of the claim is for the loss of profits, which loss resulted to petitioner on account of the breach of the contract by the Government, it is clear that the Secretary of War has no jurisdiction to adjust and settle the claim in the form in which it has been presented."

3. On December 18, 1917, the claimant entered into formal contract No. 2425 with Maj. Alexander E. Downey, Signal Corps, United States Army (later Lieut. Col. Downey), contracting officer for the Government, by which it agreed to manufacture 7,200,000 pounds of acetone. On April 18, 1918, the claimant entered into supplemental contract No. 2425-1 with Maj. Downey, contracting officer for the United States Government, and J. W. Woods, director of purchases, British war mission purchasing department, for His Britannic Majesty's Government, which modified said original contract in certain particulars hereinafter referred to and permitted the claimant to deliver to the British war mission, on direct payment by the British ministry, any part of the 7,200,000 pounds of acetone required to be delivered under the original contract. The said two contracts, hereinafter referred to as the contract, were executed in the manner required by section 3744 of the Revised Statutes and contain no termination clause.

4. The claimant entered into performance of said contract, and on November 27, 1918, received a notice from Lieut. Col. Downey requesting it to suspend production. After an exchange of letters the claimant did suspend production on midnight, December 11, 1918, when it had completed 89.7 per cent of its contract. The claimant has delivered to the British and American Governments 6,464,972 pounds of acetone and has been paid therefor at the rate of 48 cents per pound, the total sum of \$3,103,186.56.

5. The said contract of December 18, 1917, after providing that the contractor shall make 7,200,000 pounds of acetone for the Government, contains, in part, the following provisions:

"ART. II. The contractor agrees that it now has or will provide with the utmost dispatch, at the best prices obtainable:

"(1) Such administrative, purchasing, manufacturing, and accounting organization;

"(2) Such plant, machinery and tools, and other facilities, including such facilities in addition to the contractor's normal facilities (hereinafter called 'increased facilities'); and

"(3) Such labor, material, supplies, and the like as may be necessary to enable the articles to be made, and all the requirements of this contract, including the requirements in respect to the storage and delivery of the said acetone contemplated herein.

"The contractor in dealing with parties other than the Government shall make all subcontracts, purchases, payments, and other arrangements for the performing of this contract in its own name and for its own account and shall not bind or purport to bind the Government. \* \* \*

" PRICE.

"ART. IV. The price to be paid to the contractor for the said acetone herein contracted for shall be the sum of the following items:

"(1) The actual cost of production as in Article V hereof defined and in Article VII hereof determined.

"(2) The sum of ten per cent (10%) of the cost as defined and determined in subdivision (1) of this article as profit on each pound of said acetone delivered and accepted.

"(3) The sum of three and seven-tenths (3.7) cents per pound to cover depreciation on the contractor's plant, process, and system, this being equivalent to approximately ten per cent (10%) on the contractor's equipment investment.

"(4) The sum of five and five-tenths (5.5) cents per pound for the restoration of the contractor's plant, process, and system, such sum, however, to be paid only to the extent of the actual cost of such restoration to a basis sufficient in the contractor's judgment to meet the productive requirements of this contract and not to exceed the sum of four hundred thousand (\$400,000) dollars, provided that the cost of the vinegar necessary for restoration and saturation shall not exceed ten (10) cents per gallon. Should the contractor be forced to pay any sum in excess of ten (10) cents per gallon in order to procure the required amount, such excess payments by the contractor shall not be included in the aforesaid sum of four hundred thousand dollars (\$400,000), but shall be paid by the Government.

"*Provided, however,* and the contractor hereby agrees that the total cost to the Government of all acetone herein contracted for shall not exceed an average price of fifty (50) cents per pound of said acetone f. o. b. at the contractor's plant; except that the said total cost of the acetone may exceed said fifty (50) cents per pound, but only in the event and to the extent that the contractor may be forced to pay any sum in excess of ten (10) cents per gallon in procuring the required quantity of the aforesaid vinegar not exceeding two million six hundred thousand (2,600,000) gallons.

"It is agreed that the Government shall in no event pay the contractor more than three million six hundred thousand (\$3,600,000) dollars for the seven million two hundred thousand (7,200,000) pounds of acetone herein contracted for, except only in the event and



to the extent that the aforesaid vinegar costs more than ten (10) cents per gallon.

**" COST OF PRODUCTION.**

**" ART. V.** The actual cost of production of the said acetone hereby contracted for, herein sometimes called ' actual cost ' shall be determined as set forth in Article VII and is hereby defined as consisting of and including the following elements:

**"(1)** The cost of all labor definitely ascertainable as used in the production of the said acetone herein contracted for.

**"(2)** The cost of all materials and supplies definitely ascertainable as entering into or expended in the production of the said acetone herein contracted for.

**"(3)** A fair proportion of the general plant expenses incidental to the performance of this contract. If the method of distributing said general plant expenses now and heretofore in use by the contractor shall be found fairly accurate and in accordance with standards prevailing in such plants, it shall be followed by the contracting or accounting officer in distributing said general plant expenses hereunder. By the term ' general plant expenses ' is meant the indirect labor, indirect material, and other plant expenses, provided that nothing herein shall be deemed to include interest, depreciation, rent, advertising, collection expense, credit losses, discounts, and such taxes as income and excess-profit taxes imposed by the Government of the United States.

**"(4)** The sum of one (1) cent per pound on all of said acetone delivered and accepted to cover the contractor's general administrative or main office overhead expenses.

**" Subject to the approval of the accounting officer of the Finance Division of the Signal Corps, the standard cost accounting system now in effect at the contractor's plant shall be used as a basis for determining the cost of production, except in so far as it may be modified by any specific provision of Articles IV, V, and VII of this contract, and the same general method of classifying and calculating costs shall be used as was used in determining the costs on which these tenders were made, i. e., the cost and accounting system which was in effect for the six months ending June 30, 1917, with its modifications and improvements.**

**" PAYMENTS.**

**" ART. VI.** The contractor shall be paid at the rate of forty-eight (\$0.48) cents per pound, subject to adjustment as hereinafter provided, for all acetone accepted and delivered under this contract according to the following plan and conditions:

**" Each week the contractor shall present a voucher containing a statement of all acetone accepted and delivered during the previous week, together with satisfactory evidence of delivery, such as invoices and shipping documents, and the certificate of acceptance by the inspecting officer. Payment at the aforesaid price shall be made as speedily as possible and within ten days after the presentation of the aforesaid certificate and documents.**

"No payment shall be made except upon a voucher wherein the officer in charge of the Accounting Section of the Finance Department of the Equipment Division of the Signal Corps of the United States Army, or his duly authorized representative, herein sometimes called the 'accounting officer,' shall certify the amounts that he has determined and that the contractor is entitled to be paid the same in accordance with the provisions of this Article VI.

"The aforesaid billing price of forty-eight cents (\$0.48) per pound may not be the actual price to be paid as fixed in accordance with Articles IV, V, and VII of this contract, and it is agreed by the parties hereto that the said price for any and all acetone accepted and delivered hereunder in any one month shall be adjusted and determined in accordance with the aforesaid Articles IV, V, and VII within the thirty (30) days immediately following the last day of said month of delivery and acceptance.

"The difference, if any, between the said rate of forty-eight (\$0.48) cents per pound and the actual price as determined by said adjustment shall be paid by the party, if any, found to be indebted to the other party as promptly as possible and within ten (10) days from said determination. \* \* \*

#### " MATERIAL IN PROCESS

"ART. XI. The material now at the plant and in process of manufacture shall be converted into acetone and made available on this contract, and shall be billed at the price of forty-eight cents (48¢) a pound and shall be adjusted to the cost basis as determined by an average of the cost of production per pound of acetone for the first 60 days after the plant is operating in all stages of the process of producing acetone from alcohol at the required capacity for the performance of this contract.

#### " SETTLEMENT OF DISPUTES.

"ART. XVI. Except as this contract shall otherwise provide, any doubts or disputes which may arise under this contract shall be referred to a board, composed as provided in Article VII hereof, for determination. If, however, the contractor shall feel aggrieved at any decision of this board upon such reference, it shall have the right (save only as to the allowance and determination of costs, as provided for in Article VII hereof) to submit the same to the Secretary of War, whose decision shall be final. \* \* \*

#### " GOVERNMENT ASSISTANCE.

"ART. XXI. The Government agrees to lend every assistance to the contractor to enable it to procure all raw materials and supplies necessary for the performance of this contract at reasonable prices and in such quantities as are required for the performance of this agreement.

"The Government, upon the request of the contractor, shall expedite the issuance of all such priority orders and licenses from Government agencies as are necessary to assist the contractor in the prompt performance of this contract."

\* \* \* \* \*

The supplemental contract of April 18, 1918, contains in part the following provisions:

- “Whereas, doubt has been raised concerning the question of whether additions to the contractor's plant are ‘increased facilities’ within the provisions of Article II, subdivision (2) of this contract, or are properly within the provisions of Article IV, subdivision (4), a part of the restoration of the contractor's plant, process, and system; and
- “Whereas the parties hereto have definitely determined and agreed upon the sum of fourteen thousand five hundred forty-six dollars and seventy-four cents (\$14,546.74) as the total excess cost of the vinegar intended to be covered by the provisions of Article IV, subdivision (4) of the contract; and
- “Whereas it was within the spirit and intention of said contract No. 2425 and of the parties thereto at the time of the making thereof that any and all additions, improvements, or equipment necessary or likely to increase, or to make economical the operation and productive capacity of the contractor's plant for the purposes of said contract No. 2425, should be made and included in and paid for as a part of the restoration referred to in Article IV, subdivision (4) of said contract; and
- “Whereas the parties hereto having come to a mutual understanding and agreement respecting this matter, and proposing to set forth the same in these presents as declaratory of their respective rights and obligations from the date hereof henceforward for the government of themselves under the same:
- “Now, therefore, in consideration of the mutual agreements herein contained the parties hereto have agreed and by these presents do agree to and with each other as follows:

\* \* \* \* \*

“The provisions of Article IV, subdivision (4) of said contract No. 2425 shall be modified so as to read as follows:

“(4) The sum of six and forty-six one-hundredths cents (6.46) per pound for the restoration of the contractor's plant, process, and system, such sum, however, to be paid only to the extent of the actual cost of such restoration to a basis sufficient in the contractor's judgment to meet the productive requirements of this contract and not to exceed the sum of four hundred and sixty-five thousand dollars (\$465,000). There is included in this sum of four hundred and sixty-five thousand dollars (\$465,000) the sum of fourteen thousand five hundred and forty-six dollars and seventy-four cents (\$14,546.74) which the vinegar necessary for restoration and saturation has cost in excess of ten cents (10¢) per gallon for the quantity required. There is and shall be included as part of restoration, in this sum of four hundred and sixty-five thousand dollars (\$465,000), the cost of the buildings, additions, improvements, and equipment heretofore made or which, in the contractor's judgment, shall hereafter be necessary to be made at the contractor's plant, including, among others, the acetone drum house, the ester drum house, the malt-house additions, the vacuum system, and the new stick dryers; provided, however, and the contractor agrees, that the total cost to the United States of all acetone herein contracted for shall not exceed an average



price of fifty cents (50¢) per pound of said acetone f. o. b. at the contractor's plant. It is agreed that the United States shall in no event pay the contractor more than three million six hundred thousand dollars (\$3,600,000) for the said seven million two hundred thousand (7,200,000) pounds of acetone herein contracted for.

“There shall be subtracted from the maximum figure of four hundred and sixty-five thousand dollars (\$465,000), toward restoration, for which it is provided in this article and subdivision that the United States may be responsible, the sum of six and forty-six one-hundredths cents (6.46¢) for each pound of acetone sold by the contractor under the provisions of this agreement and of any supplements thereof to persons other than the United States. It is the understanding and intention of the parties hereto that the contributions to said restoration fund of four hundred and sixty-five thousand dollars (\$465,000) and the payment of the elements of cost and of the purchase price of the quantity of said acetone contracted for under said contract No. 2425 should be made by the purchasers, including United States and the British Government, only in proportion to the quantity of said acetone sold and delivered to each of the buyers, respectively, in accordance with the provisions of said contract No. 2425, as hereby modified.

“Any adjustments of price to United States or British Government made necessary by the provisions of this paragraph may be computed and payments made accordingly once for all at the termination of said contract No. 2425 if, in the opinion of United States, such procedure shall be advisable.” \* \* \*

“ART. IX. Except as herein expressly modified, the aforesaid agreement under date of December 18, 1917, being contract No. 2425, Order No. 20351, and Req. No. A-6034, shall be and hereby is in all respects ratified and confirmed.”

It will thus be noted that on April 18, 1918, four months after claimant executed its original contract, it entered into a supplemental contract which ratified and confirmed the original contract, except as modified by the supplemental contract. The restoration charge, not to exceed the sum of \$400,000 plus an addition if vinegar cost more than 10 cents a gallon, as fixed in the original contract, was enlarged by the supplemental contract to \$465,000, in which figure there was included the sum of \$14,546.75, which the vinegar necessary for restoration had cost the contractor in excess of 10 cents a gallon. The supplemental contract fixed without exception the price of acetone at a maximum of 50 cents a pound and provided that in no event shall the contractor be paid more than \$3,600,000 for the 7,200,000 pounds of acetone contracted for.

6. It will therefore be noted that, according to the terms of the said contract, the claimant was to be paid the actual cost of acetone, not to exceed 50 cents a pound, and in no event is the claimant to be paid under said contract an amount exceeding \$3,600,000. As previously stated, the claimant had been paid \$3,103,186.56 and made claim for \$894,610.20, which claim has been reconciled and reduced

by salvage to \$707,131.71. The claimant therefore now asks for \$210,318.27 in excess of the amount that it would be entitled to receive had the contract as written gone to completion.

7. It appears from the evidence that Mr. James L. Brown, Government accounting officer at the claimant's plant at Curtis Bay, Md., in company with his four assistants, examined all vouchers to ascertain the cost of production of the acetone, which had ceased at midnight on December 11, 1918. Mr. Brown made an audit report, dated February 27, 1919, which he submitted to Capt. Littlejohn, of the Finance Division of the New York District Bureau of Aircraft Production. This 33-page report shows that \$129,297.98 was due the contractor. There was testimony that every item charged against the Government in this report had actually been expended on the contract and each of said expenditures was evidenced by vouchers approved by the plant approvals officer. The superintendent of the claimant's plant testified that all of the expenses which were evidenced by approved vouchers were actually expended by the claimant in the performance of the contract or in preparation to further perform it, and the amounts called for in the vouchers had been paid by the claimant. This testimony was corroborated by Dr. M. E. Whittaker, president of the claimant company. The Brown report was based solely on the contract and its terms, and the final figures of \$129,297.98 represent the difference between the billing price of acetone delivered at 48 cents per pound and the maximum price of 50 cents a pound set forth in the contract.

8. In June, 1919, after certain negotiations for a settlement of claimant's contract, Lieut. Col. Downey, who then also had charge of the Finance Division of the Air Service, instructed Lieut. W. D. Williams, assistant to Chief of Material Disposal and Salvage Division of the Air Service, to make a further examination of the books and papers at claimant's plant owing to the fact that the decision of the plants approval officer disallowing certain items of expenditure which had been overruled and some of the items had been approved since the making of the Brown report, thus increasing the costs. In accordance with these instructions, Lieut. Williams did make an examination of the claimant's accounts, to find the discrepancies between the plant accountant and the contractor. He reconciled the cost figures of the plant accountant with the amounts claimed by the contractor and established the cost of production and restoration costs, and agreed upon salvage values. On July 2, 1919, Lieut. Williams rendered a report to Col. Downey which contains a summary of the reconciliations between the costs contained in the Brown report and the contractors figures. This report shows that \$707,131.71 is due the contractor, provided certain items were amended, but Lieut. Williams testified he had no authority to amend them. This amount is

in excess of the amount to which the claimant would be entitled had it fully completed its formal contract with the Government. Lieut. Williams handed this report to Col. Downey, who approved it and directed Lieut. Williams to have a settlement contract drawn up in accordance therewith to be submitted to the Claims Board for approval. The proposed settlement contract has never been approved by the Claims Board. Col. Downey testified that when Lieut. Williams handed him the report he merely glanced through it generally and did not go into the details of it, nor did he know that the report provided for payment to the contractor of more than the total amount to be paid under the contract.

9. It sufficiently appears from the evidence that the claimant did purchase for the performance of its contract with the Government all the materials, facilities, supplies, and equipment which is shown by the Brown and Williams reports to have been purchased, and that the said supplies and materials, machinery, etc., were intended to be used in the performance of the said contract, and that such supplies and materials as were not used were left upon the claimant's hands at the suspension of operation on said contract after 89.7 per cent of said contract had been completed.

10. At the hearing the claimant offered to introduce evidence tending to show that paragraphs 1 and 2 of Article XXI of the contract are ambiguous because of certain statements that had been made to Dr. M. E. Whittaker, president of the claimant company, prior to the execution of the contract of December 18, 1917, by Lieut. Col. Horner, Mr. Henry Lockhart, jr., and Mr. M. L. Summers. Lieut. Col. Horner was executive officer for the Air Service. His function was to handle the personnel, interview the contractors, but he was not a procurement or contracting officer and had no authority to obligate the Government in any way. Mr. Lockhart had charge of the Raw Materials Division of the Air Service, and his duty was to locate sources of supply for basic materials for the production of airplanes and to negotiate initially on contracts subject to approval and execution by the contract department. He had no power to make contracts. Mr. Summers was an agent of Mr. Lockhart and had such powers as Mr. Lockhart might delegate to him. Subsequent to the proffer of evidence tending to show an ambiguity, counsel for the claimant stated that Mr. Lockhart was the only man who talked to the contractor with reference to the contracts, thereby admitting that the testimony of Lieut. Col. Horner and Mr. Summers would be incompetent for any purpose.

As the offer was first framed by counsel for the claimant it amounts to this: The understanding, intent, and agreement of the negotiants to the contract was that the Government was to effectually assist the contractor to the extent of enabling the contractor to get

all facilities, supplies, materials, and equipment within the time limited and upon the terms and conditions stated in the contract, and in event the contractor could not perform with such aid it should be paid its total out-of-pocket cost incurred. The claimant contends that this intent and agreement "is not correctly reflected" in paragraphs 1 and 2 of Article XXI of the contract, and that the true intention of the negotiants was, amongst other things, that the Government was to furnish the claimant with vinegar for the production of the acetone and promised to furnish it, and even temporarily prevented the contractor from obtaining the vinegar, and was to get priority orders for all material, and obligated itself to assist the contractor in every way, but failed to do so. These understandings, which are admitted by counsel to be agreements outside the specific terms of the contract, are contended to render Article XXI ambiguous. Counsel further stated that the words of the contract "The Government agrees to lend every assistance to the contractor to enable it to procure raw materials" had a definite meaning to the negotiants of the contract which does not appear on the face of Article XXI, and hence that article should be held ambiguous, and extraneous evidence should be received to interpret it, thus reading into it the entire prior understandings between Mr. Lockhart and Dr. Whittaker. When asked what was the purpose of this offer counsel for claimant stated that this Board has the power to make the contract conform to the agreement of the parties at the time of its execution; and if the contract was made to express the actual agreement, the contract itself would provide for payment to the contractor of the total amounts of disbursements as shown by the audit reports offered in evidence.

The Board declined to receive this evidence, assigning as the ground for its refusal the fact that Article XXI was not ambiguous on its face; and as the evidence showed that Mr. Lockhart had no authority to make a contract binding on the Government, any statements or agreements made by him as negotiator, with no power to bind the Government, will be presumed to have been merged in the contract. To this ruling counsel for claimant excepted.

Thereupon counsel for claimant brought out through the testimony of Col. Downey the fact that Col. Downey did not have any conversation with the claimant's representative previous to his signing the contract in behalf of the Government and never had any communication with Mr. Lockhart concerning the contract, except on the question of New York overhead. Col. Downey had previously testified that when he executed the contract of December 18, 1917, and the contract of April 18, 1918, as contracting officer for the Government the said contracts as drawn at the time evidenced the intent and purpose of the contracting parties.

Counsel for the claimant then renewed the offer to prove that there is an ambiguity in Article XXI of the contract, stating:

"I am not endeavoring to set up here, sir, at all that anything that Mr. Lockhart did or that any other gentlemen did—that Col. Downey did—raises an agreement binding on the Government. What I am trying to show is that an agreement was entered into by Col. Downey on behalf of the Government with the contractor, and that there was an ambiguity in that agreement. No other agreement was entered into at all. \* \* \* I am trying to show an ambiguity, and no one on earth can know the ambiguity except the people who conducted the negotiations. \* \* \* A real ambiguity exists when the minds of the parties did not meet in any given clause. That is what I purpose to prove here."

The Board declined to receive this evidence and counsel for the claimant excepted to this ruling.

11. At the hearing counsel for claimant also offered evidence to show that Article IV of the contract of December 18, 1917, and Article VI of the contract dated April 18, 1918, were inserted in the said contracts under a mutual mistake of facts, and that, therefore, the said contracts should be reformed. Counsel stated that it was clearly the intention and understanding of the parties that the total excess cost of saturation of vinegar referred to in supplemental contract No. 2425-1 should cover and include only that excess cost of a certain 55 tank cars of vinegar that had been procured, bought, and paid for by the Government, and which was caused by the Government to be delivered to claimant between January 16 and March 19, 1918, and that there was a mistake in framing Article VI in the supplemental contract, because Article IV of the original contract contemplated that the contractor should be paid for any excess cost of vinegar over the cost to it of 10 cents a gallon. Counsel stated that Col. Downey, who executed said contracts on behalf of the Government, did not understand the making of acetone and that negotiants (Dr. Whittaker and Mr. Lockhart) were the only persons who knew how to draw a contract for the production of acetone, and that Col. Downey and the contractor entered into the contract under the mistake of a fact which was not in accordance with what the negotiants to the contract had in mind. In other words, counsel for claimant contends that the contract should be reformed, inasmuch as Col. Downey did not completely understand every item of the contract, and so he executed the supplemental contract under a mistake of fact, because he did not know what would happen under any conceivable circumstance. The Board ruled against admitting the testimony offered, to which ruling the claimant excepted.

12. In regard to the letters and conferences in regard to the notice to suspend production, it appears that Col. Downey wrote the claim-





" This schedule is submitted in accordance with the request of the chairman appearing upon pages 219 and 225 of the transcript of the minutes of the hearing on May 7, 1920."

## DECISION.

1. In the findings of fact we have attempted to fully set out the facts relating to this claim so as to show the contentions which the claimant's attorneys have set forth at various times as the basis for recovery from the Government of an amount greatly in excess of the sum the claimant would have been entitled to had it fully performed its contract. The prior decision of this Board denies the claimant any relief whatsoever. Counsel for the claimant now contends that there is an ambiguity in the first and second paragraphs of Article XXI of the contract of December 18, 1917, which reads as follows:

" ART. XXI. The Government agrees to lend every assistance to the contractor to enable it to procure all raw materials and supplies necessary for the performance of this contract at reasonable prices and in such quantities as are required for the performance of this agreement.

" The Government, upon the request of the contractor, shall expedite the issuance of all such priority orders and licenses from Government agencies as are necessary to assist the contractor in the prompt performance of this contract."

The claimant's supplemental petition throws a strong light on this offer to prove an ambiguity. It asserts that in November and December, 1918, Mr. Lockhart agreed with Dr. Whittaker, president of the claimant company, that the Government would undertake to secure the necessary saturated vinegar, and would commandeer it if necessary. The petition further alleges that the Government did procure 440,965.95 gallons of vinegar prior to March 15, 1918, and, by reason of the failure of the Government to procure the total of 2,600,000 gallons of vinegar, the claimant's cost of restoration of the vinegar was increased. When the counsel for the claimant offered to prove an ambiguity in Article XXI of the contract, he stated that the said article does not clearly reflect the intent and agreement of the negotiants, because that intention was that the Government was to furnish the claimant with the vinegar for the production of the acetone, and that the phrase in Article XXI, "The Government agrees to lend every assistance to the contractor to enable it to procure raw materials," had this definite meaning to the negotiants, which was that the Government should obtain the vinegar. When asked what the purpose of this offer to prove an ambiguity was, the counsel for the claimant stated that if the contract was made to express the actual agreement the con-



tract itself would provide for payment to the contractor of the total amount of disbursements as shown by the audit reports offered in evidence. In a nutshell, therefore, the offer to prove an ambiguity is an offer to read into it that the Government would furnish the vinegar to the contractor, and if it failed to do so it would pay the contractor for its out-of-pocket expenses.

If, under the guise of explaining an ambiguity, the contract was interpreted to mean this, the question arises whether the terms of the contract would be altered or enlarged, or whether full effect could be given to all the terms of the contract without contradiction. It will be noted that Article II of the original contract provides that the contractor has or will provide the organization, plant, facilities, and "3. Such labor, material, supplies, and the like as may be necessary to enable the articles to be made and the requirements in respect to storage and handling of said acetone contemplated herein."

"The contractor, in dealing with parties other than the Government, shall make all contracts, purchases, payments, or other arrangements for the performance of this contract in its own name and for its own account, and shall not bind or purport to bind the Government."

In addition to this, the supplemental contract of April 18, 1918, ratified and confirmed the agreements contained in the original contract which were not expressly altered, thus ratifying and confirming Articles II and XXI in toto. It would seem, therefore, that the claimant is now estopped from alleging that there was an ambiguity in the original contract. The said supplemental contract further provides, by Article VI thereof, that in no event shall the United States pay the contractor more than \$3,600,000 for the 7,200,000 pounds of acetone contracted for. We thus have definite provisions that the contractor and not the Government shall furnish the material and supplies to make the acetone and in no event shall the Government pay more than \$3,600,000. By the offer to prove an ambiguity, as explained by the statement of claimant's counsel, it is clear that Article II of the original contract requiring the contractor to furnish the material would be nullified and so would Article VI of the supplemental contract. Counsel admits that no other agreement than that contained in the contract was entered into, but he alleges that there is an ambiguity in Article XXI.

In his brief counsel cites cases where parole evidence has been admitted to explain ambiguities and doubtful phrases so as to gather the true intent of the parties. He also cites authorities showing that the surrounding circumstances may be proven so as to show the intent of the parties. These rules of law are well recognized, and if the case now under consideration truthfully fell within the scope of

these authorities, they would control our decision, but it does not. We are not to be misled by the true purpose of the offer to prove an ambiguity when its purpose is revealed by the statements of counsel. To allege a contract ambiguous is not to make it so. On reading Article XXI of the contract it is apparent that it is not ambiguous on its face and therefore it needs no explanation. Under the pretense of interpreting plain language by showing the intention of the negotiants to the contract and their surrounding circumstances, counsel offers to introduce evidence to show that the words in the contract that the Government will "lend every assistance to the contractor to enable it to procure raw materials and supplies necessary for the performance of this contract," means that the Government would itself supply the vinegar.

Doesn't the present offer transgress the parole evidence rule? Since 1667, in the reign of Queen Elizabeth, there have been statutes of frauds, and the rules of evidence have been governed thereby, where contracts are reduced to writing. Parole evidence may not be introduced to vary, add to, or subtract from its terms, otherwise the statute of frauds would be a nullity. It is true that other considerations may permit the introduction of parole evidence so as to ascertain the true intention of the parties to the contract and to this end some latitude is allowed. But the reception of such evidence will not be permitted when its effect is to alter or enlarge a contract as written, which is conclusively presumed to be the agreement of the parties. Can there be any plainer case of adding to or altering the terms of a written contract by parole evidence than this case now presented by this record? If the evidence offered were received under the guise that it pretends to explain an ambiguity, which does not appear on the face of the contract, and if it shows that which counsel states it will show, with the results which he states will ensue, then the mask, labeled ambiguity, will fall, to reveal a contract completely altered in its terms so that the contract would read, the Government is to furnish the contractor with material and supplies, and in default of so doing, the contractor shall be paid by the Government any excess cost it has been put to. To so alter the contract is to make an agreement entirely different from the agreement evidenced by the written contract.

2. The question of whether evidence is admissible in a given case to explain an ambiguity or to show surrounding circumstances is often a doubtful one owing to the particular facts of the case under consideration. It is never permitted where the evidence offered is inconsistent with or will contradict the terms of the contract. It is only permissible in order to construe a contract. It is one thing to construe a contract so as to gather the intent, as was said in *Eustis*

*Mining Co. v. Beer* (239 Fed., 976-985), "the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include," and it is a very different thing to supply an added obligation not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract and it is another thing to take writing which on its face imports limited obligations and make it import greater or different obligations by parole evidence. The duty and power of the court is to give construction to what is written and not in any case to permit it to be added to by parole evidence. It is immaterial whether the offer is to explain an ambiguity so as to show the intention of the parties either by proof of usage, surrounding circumstances or prior understandings. These are merely different ways of ascertaining the intention of the parties. Though parole evidence may be received so as to explain what the intention really was, it may not be used to engraft upon the contract new stipulations nor contradict those that are plain.

The following authorities fully sustain the principles we have announced:

In *Oelrichs v. Ford* (23 How., 49) it was held that there must be ambiguity or uncertainty upon the face of a written instrument, arising out of the terms used by the parties in order to justify the extraneous evidence of usage; and, when admissible, it *must be limited in its effect to the clearing up of the obscurity. It is not admissible in order to add to or engraft upon the contract new stipulations, nor to contradict those that are plain.* Proof of usage is inadmissible where there is no ambiguity or uncertainty in the terms of a contract, and the condition sought to be annexed was not by way of explanation or interpretation, but in addition to the contract. Any conversations or verbal understandings between the parties prior to the execution of the contract are merged in the contract and parole evidence is inadmissible to engraft them upon it.

In *DeWitt v. Berry* (134 U. S., 306) the court said:

"When parties have deliberately put their engagements into writing in such terms as to import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous colloquium between the parties \* \* \* as it would tend in many instances to substitute a new and different contract from the one which was already agreed upon, to the prejudice possibly of one of the parties is rejected."

In this case the court held that an express warranty of quality excludes an implied warranty that the articles sold were merchantable or fit for their intended use.

In *Union Sales Co. v. Jones* (128 Fed., 672) it was said:

"That which may be shown is frequently spoken of as the surrounding circumstances, but it does not include the prior representations, proposals, and negotiations of a promissory character leading up to and superseded by the written agreement. These can not be engrafted upon it. (*Union Stock Co. v. Western*, 59 Fed., 49; *Bast v. Bank*, 101 U. S., 93; *Oelricks v. Ford*, 23 Howard, 49; *Ferguson Contracting Co. v. Manhattan Trust Co.*, 118 Fed., 791; *Bradley v. Steam Packet Co.*, 10 L. Ed., 72.)"

In *Moore v. United States* (96 U. S., 157) it was held that a custom existing between shippers and shipowners requiring a consignee to designate a berth for the discharge of cargo can not prevail over the terms of a contract requiring delivery of coal "at the wharf," so as to render the Government liable for delay in the ship's reaching its berth. The court said:

"The effect of usage upon contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, but not to vary or contradict the terms of the contract. Various applications of these principles are presented in the following cases: *Barnard v. Kellogg* (10 Wall., 382); *Hearne v. New England Mut. Marine Ins. Co.* (20 Wall., 488); *Orient Mut. Ins. Co. v. Wright* (1 Wall., 465); *Oelricks v. Ford* (23 How., 19); *Hostetter v. Park* (137 U. S., 30); *Bank v. Burkhart* (100 U. S., 686)."

In *Godkin v. Monahan* (83 Fed. (C. C. A.), 116), the authorities are fully quoted and it was held that whenever a written contract purports on its face to be a memorial of the transactions to which it relates, it supersedes all prior negotiations and agreements, and oral testimony will not be admitted of prior or contemporaneous promises on a subject clearly connected with a principal transaction as to be part and parcel of it, without the adjustment of which the parties can not be considered as having finished their negotiations and finally concluded a contract. It was further held that where an engagement is to perform an act it involves an undertaking to secure the means necessary to accomplish the object, and parole evidence is not admissible to show that the opposite party was to obtain some of the necessary means to perform the contract:

In *Standard Sewing Machine Co. v. Leslie* (78 Fed. (C. C. A.), 325), it was said:

"It is undoubtedly true that proof of the circumstances out of which the contract grew, and which surrounded its adoption, may be proven to ascertain its subject matter and the standpoint of the parties in relation to it, where the language is obscure or doubtful; but such evidence can not be received to vary the contract by additions or substitutions. (*West v. Smith*, 101 U. S., 263, 271; *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 59 Fed., 49.) \* \* \* We find the instrument in question to be couched in

plain unambiguous terms. It is, therefore, the best possible evidence of the intent and meaning of the parties."

In *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.* (59 Fed., 57), the court rejected parole evidence offered and said:

"Resort may be had to proof of the circumstances out of which the contract grew, and which surrounded its adoption, to ascertain its subject matter, and the standpoint of the parties in relation to it but not to vary the contract by addition or substitution. \* \* \* But resort to surrounding circumstances is not allowed, for the purpose of adding a new and distinct undertaking. (*Maryland v. Railroad Co.*, 22 Wall., 105.) The circumstances surrounding the making of a contract is one thing. The parole negotiations leading up to the written agreement is another and quite different thing. Parole evidence may be received of the existence of an independent oral agreement, not inconsistent with the stipulations of the written contract, in respect to a matter to which the writing does not speak, but not to contradict the contract."

In *Northwestern Lumber Co. v. Grays Harbor, etc., Ry. Co.* (208, 624; affirmed C. C. A., 221 Fed., 807) it was held that where a contract for the sale of land for railroad purposes required the vendor to assist in procuring of franchises for the vendee in H., parole evidence was inadmissible to establish a claim that such a provision contemplated the obtaining a franchise for and the construction of a joint user bridge an agreement with the city to contribute to its cost.

In *Shea v. Leisy* (85 Fed., 243) the court, after stating the parole-evidence rule, said:

"In *Hunter v. McHose*, supra (100 Pa. St., 38), the offer to show that the defendant would not have signed the agreement except for the contemporaneous verbal understanding was treated as inadmissible; and, most plainly, if such allegations opens the door for parole evidence, the salutary rule which was intended to preserve the sanctity of written contracts would be eluded without difficult and practically abrogated."

It is clear from the above authorities that in the present case the evidence offered to show an ambiguity is inadmissible, in that it would add to or engraft upon the contract new stipulations and would contradict the positive provisions of the contract. In addition to this, the verbal understandings between the negotiants are presumed to have been merged in the contract, and hence any statements or promises alleged to have been made by the negotiating officers of the Government who had no power to contract are conclusively presumed to have been incorporated in the contract. (See *Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544; *Seitz v. Brewers Refrigerating Machine Co.*, 141 U. S., 510; *Union Selling Company v. Jones*, 128 Fed., 672, C. C. A.)

When we consider the whole offer in its true light, coupled with the statements made by counsel and the facts shown of record, it is



clear that the offer in question is for the purpose of injecting evidence into the record that the Government and not the contractor was to obtain the vinegar; and if the Government failed to do so, the contractor would be paid its out-of-pocket expenses in excess of the maximum amount authorized to be paid the contractor under the terms of the contract. Thus the express provisions of the contract would be altered and enlarged and there would be engrafted upon the contract new stipulations and agreements. For the reason stated, we are of the opinion that Article XXI is not ambiguous and the evidence offered was properly rejected.

3. *Mistake*.—At the hearing counsel for the claimant offered evidence to show that the provisions of Article IV of the supplemental contract of April 18, 1918, were incorporated through a mistake of fact which existed at the time of its execution, and therefore asked that the said contract be reformed. The evidence offered is summarized on page 14 of this decision. The Board declined to receive the evidence, to which ruling counsel for the claimant excepted.

The preamble to said supplemental contract alleges that:

"Whereas the parties hereto have definitely determined and agreed upon fourteen thousand five hundred and forty-six dollars and seventy-four cents (\$14,546.74) as the total excess cost of vinegar intended to be covered by Article IV (subdivision 4) of the contract \* \* \* and \* \* \* whereas the parties hereto having come to mutual understanding and agreement respecting this matter and proposing to set forth the same in these presents as declaratory of their respective rights and obligations *from the date hereof henceforward* for the government of themselves under the same.

"Now, therefore, in consideration of the mutual agreements herein contained, the parties hereto have agreed and by these presents do agree to and with each other as follows."

And then is inserted a provision modifying subdivision 4, Article IV of the original contract in the following respects: \$465,000 is allowed as a restoration charge instead of \$400,000 allowed by the prior contract, and it is alleged that the sum of \$465,000 includes the sum of \$14,546.74, "which the vinegar necessary for restoration and saturation has cost in excess of ten (10) cents per gallon for the quantity required." This new article concludes:

"The contractor agrees that the total cost to the United States of all acetone herein contracted for shall not exceed an average price of fifty (50) cents per pound for said acetone f. o. b. at the contractor's plant. It is agreed that in no event shall the United States pay more than \$3,600,000 for said seven million two hundred thousand (7,200,000) pounds of acetone herein contracted for."

It will, therefore, be noted that the preamble to the contract specifically states that the parties have agreed on a definite sum as the

total excess cost of vinegar intended to be covered by the prior contract "from the date hereof and henceforward." By this specific agreement the parties inserted in the contract a provision expressing their belief and forecast what the vinegar necessary to complete the contract would cost in excess of ten cents a gallon and it is now alleged that there was mistake in inserting this amount in that it developed that the excess cost of the vinegar was greater than the amount agreed upon. In other words, the mistake alleged is not relative to a present and existing fact but as to an error of calculation as to the cost which could be definitely ascertained only in the future.

4. The provision relative to the cost of vinegar was manifestly inserted in the supplemental contract so as more definitely to fix the amount which should be paid the contractor for the excess cost of vinegar as allowed by the original contract. It was in the nature of an adjustment between the contractor and the Government. In *Hennesy v. Bacon* (137 U. S., 78), it was held:

"A compromise of a disputed claim, the parties dealing with each other on terms of perfect equality, holding no relations of trust or confidence to each other and each having knowledge, or having opportunity to acquire knowledge, of every fact bearing on the question of validity of their respective claims, ought not to be overthrown, even if the court should now be of the opinion that the parties complaining of it surrendered rights that the law, if appealed to, would have sustained."

It is a well-established principle that reformation will not be granted unless there are strong and cogent reasons for so doing and the evidence is convincing. In the manner in which the offer was framed by counsel for the claimant, it was apparent that the facts upon which the claimant relies were not communicated to Col. Downey who was the contracting officer but were only in the minds of the president of the claimant company and Mr. Lockhart who had no power to contract or bind the Government. It is, therefore, difficult to see how there could be any mutuality in the mistake complained of, and in reaching this conclusion we do not rely on the testimony of Col. Downey that the contract as drawn evidenced the true intent and purpose of the contracting parties.

5. Assuming for the purpose of argument that there was a mutual error in inserting in the supplemental contract the amount which vinegar necessary to complete the contract would cost, it is well established by the authorities that it is not every mistake that will lay the foundation for the reformation of a contract. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Mistakes relating to future happenings are not facts. The offer to prove mistake conclusively shows that the alleged error was due to mistaken calculation as to the future cost



to the contractor of the vinegar. This is not a mistake of a present and existing fact, and hence is not such a mistake for which equity will relieve.

In *Park v. City of Boston* (175 Mass., 464), it was held that a mistaken belief or expectation as to the probable occurrence of a future event is not the kind of mistake which will entitle a party to relief in equity. The court said:

“This is not mistake of fact within the meaning of that term in the rules of equity concerning the rescission and reformation of a contract. The mistake must be with respect to a fact, past or present. (Kerr Fraud & M., 476; Beach Mod. Eq. Jur., sec. 49; *Southwick v. Bank*, 84 N. Y., 420.)”

In *Chicago & N. W. Ry. Co. v. Wilcox* (116 Fed. (C. C. A.), 913), it was said:

“It is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by a mistake of a past or present fact material to the agreement. Such an effect can not be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, can not have this effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties. (*Knowalke v. Light Co.* (Wis.), 79 N. W., 762, 764; 74 Am. St. Rep., 877; *Bank v. McGeoch*, 92 Wis., 286, 313; 60 N. W., 606, 614; Pom. Eq. Jur., par. 855; Beach Mod. Eq. Jur., par. 43, 56; *Seeley v. Traction Co.*, 179 Pa., 334, 338; 36 Atl., 229; *Homuth v. Railway Co.*, 129 Mo., 639, 646; 31 S. W., 903; *Klauber v. Wright*, 52 Wis., 303, 314; 8 N. W., 893.)”

In the light of the above authorities and based upon cogent reasons, it is apparent that the offer to prove a mistake showed on its face that the evidence was improper, and had it been received it could not have been made the basis for a reformation of the contract. We therefore conclude that it was properly excluded.

6. Having disposed of the errors, assigned by counsel for the claimant, regarding the hearing of case, we are of the opinion that the claimant's right depends solely upon contract 2425 and supplemental contract 2425-1 as written.

In the prior decision of this Board all relief was denied the claimant because it made claim for damages beyond the agreement, which claim was in part for damages caused by the alleged failure of the Government to carry out its alleged agreements, and in part from damages flowing from the act of the Government in "breaking" the contract, and in part for loss of profits due to said alleged breach of contract by the Government. We have shown that the evidence offered to show damage or added allowances caused by the alleged failure of the Government to carry out its alleged agreements was inadmissible, because no separate agreement other than that set forth in the contract is relied on and the evidence offered would merely contradict and vary the terms of the said contract. In addition to this there was no "breaking" of the contract by the Government. The contract was merely suspended. It is, therefore, the function of the Secretary of War to settle this contract in strict accordance with its terms, and irrespective of any extraneous matters or claims.

The terms of contract No. 2425, as modified by contract No. 2425-1, authorize the Government to pay to the contractor the maximum price of 50 cents per pound for 7,200,000 pounds of acetone to be furnished, and the United States shall in no event pay the contractor more than \$3,600,000. This is a definite and fixed maximum of liability to the contractor. The contractor completed 89.7 per cent of the contract. It furnished to the American and British Governments 6,464,972 pounds of acetone for which it has been paid the sum of \$3,103,186.56, which is at the rate of 48 cents a pound.

In addition to the items of claim referred to in the prior decision of this Board, the contractor has shown that it purchased facilities, material, and supplies for the performance of this contract and paid for labor and expenses in the performance of said contract which were not specifically referred to in the prior decision of the Board. These and kindred items enumerated in the Supply Circulars, as a class, are proper items of allowance on suspension of the contract in so far as they do not exceed the sum of \$496,813.44. This sum added to the \$3,103,186.50 which the contractor has already received makes the total of \$3,600,000 which is maximum sum the contractor was entitled to receive had it completed the contract, and which is the maximum sum that it may be paid under its terms. From the total amount which the contractor would be entitled to receive under the terms of the contract proper deductions should be made for the value of acetone used by the contractor, salvage, etc., and an apportionment should also be made in the liability of the British and American Governments.

7. While the contractor has confused the proper consideration of this claim by lumping its total expenses together, so that there will be difficulty in segregating proper items of allowance from those to which the contractor is not entitled, we think that the adjustment board will be greatly aided in its labors by the audit reports of Mr. James L. Brown and Lieut. W. D. Williams, which were offered in evidence. These reports, though in no wise conclusive on the Government when read in connection with the testimony which formed the basis of their reception in evidence, are to be treated as evidentiary of only the proper items of allowance to which the contractor is entitled, and are not to be taken in toto as an account stated.

8. The Board of Contract Adjustment, therefore, recommends to the Secretary of War that an adjustment be made with the claimant in accordance with this opinion, and that a settlement contract based on such adjustment be tendered the claimant in final settlement of its contracts Nos. 2425 and 2425-1.

(Col. Delafield and Mr. Hendon concurring.

JUNE 8, 1920.

**Case No. 2246.**

*In re* **CLAIM OF HAMILTON CARHARTT COTTON MILLS (LTD.).**

- 1. EXTRA EXPENSE IN BALING.**—Where at the time purchase orders are issued for the manufacture of coats and trousers it is contemplated that they be baled for domestic shipment, and prior to their shipment claimant is directed to bale the clothing for overseas shipment and incurs additional expense in so doing, there is an obligation on the part of the Government to reimburse claimant for such additional expense.
- 2. CLAIM AND DECISION.**—Claim for \$220 under the act of March 2, 1919, for expense in baling clothing for overseas. Held, the claim is within the meaning of the said act.

Mr. Averill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$220 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Claimant's statement of claim, Form B, bears date of November 10, 1919. However, Arthur L. Lemon, major, Quartermaster Corps of the zone supply office, Philadelphia, Pa., makes affidavit that claimant filed claim for extra expense alleged to have been incurred in fulfilling its contract No. 3593-P prior to June 30, 1919.

3. Under date of May 24, 1918, the purchasing officer, Quartermaster Corps, issued an order No. 3593-P to claimant, the Hamilton Carhartt Cotton Mills (Ltd.), Toronto, Canada, for 30,000 coats and 15,000 pairs of trousers made of blue or brown denim at the unit price of \$1.75 per garment, f. o. b. factory, delivery to be completed by June 15, 1918. This order was proxy signed and is an informal contract.

4. When the above order was issued it was the intention of the Government that the clothing should be baled for domestic shipment, but later it was found necessary to have same baled for overseas shipment which materially increased the expense.

5. The affidavit of Capt. A. L. Lincoln, jr., Quartermaster Corps, and the affidavit of Mr. John Weichers, a member of the purchasing committee of the Ordnance Department, and the affidavit of the claimant establish the fact that the clothing in question was baled for overseas shipment and accepted by the Government and that such extra expense was authorized.

#### DECISION.

1. This case is similar to that of the Peabody's Co. (Ltd.), Case No. 150-C-647, decided by this Board on February 5, 1920.

2. From the evidence it is the opinion of this Board that an agreement within the purview of the act of March 2, 1919, was entered into between the claimant and the Government whereby there arose an obligation on behalf of the Government to reimburse the claimant for the actual extra expense to which claimant was put by reason of complying with the direction and instruction of the agents of the Government in baling the goods for overseas shipment.

3. That certificate C issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.

JUNE 8, 1920.

Case No. 1818.

*In re* CLAIM OF LIBERTY IRON WORKS.

1. **IMPLIED AGREEMENT.**—Where a contractor is engaged in production under a written contract and a purchase order, and is directed by duly authorized agents of the Government to perform extra work not contemplated under original agreement, there is an implied agreement within the purview of the act of March 2, 1919, whereby the Government is obligated to reimburse claimant in the amount of the extra work.
2. **CLAIM AND DECISION.**—Claim for \$621.46 under the act of March 2, 1919, for extra work in producing airplane equipment. Held, an agreement within the meaning of the act.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$621.46 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The case is to be decided upon the record without a hearing.

3. From the record it appears that the Liberty Iron Works (the claimant) were engaged prior to November 12, 1918, and during the emergency created by the war with the Imperial German Government in the manufacture of airplane and aeronautical equipment for the Signal Corps, United States Army, under formal contracts; that during the period from April 26, 1918, to November 5, 1918, certain extra work apart from the work covered by the formal contracts was performed by the claimant company at the request and under the direction of officers of the United States Army, and claimant alleges that by reason of having obeyed such instructions and having performed the work as directed that an implied agreement has arisen whereby the Government is obligated to reimburse claimant for the money so expended.

4. The affidavit of Charles A. Bush, second lieutenant, Air Service (Aircraft Production), in charge of production and inspection, Bureau of Aircraft Production, shows that a certain motor which

was Government property and which under the terms of the contract should have been in condition for installation when received by the claimant company was not in such condition and that it was necessary to have work amounting to \$6, covered by invoice dated April 26, 1918, done.

5. The affidavit also shows that certain wing bearing plates which were to be furnished to the contractor should have been in condition for assembly on receipt, but were not in such condition, and that it was necessary before same could be used to re-form the said wing bearing plates, which work is covered by the invoice of June 28, 1918, and amounts to \$541.22.

6. Invoice of October 9, 1918, for radiator support plates, \$45, and the unloading of motors covered by invoice November 5, 1918, \$29.24, are shown by the affidavits attached to have been work ordered, accepted, and approved by officers or agents acting under the authority of the Secretary of War.

7. These invoices were prepared on the theory that they could be settled under contract No. 1800A, Ordnance Order No. 20033A and orders Nos. 720667, 720472, but this contract and these orders did not contemplate or provide for such work and such services were not settled thereunder.

#### DECISION.

1. It is the opinion of the Board, from the records and the affidavits therein, that during the period from April 26, 1918, to November 5, 1918, the claimant was directed and instructed by officers or agents acting under the authority of the Secretary of War to perform the extra work as set up in the claim; that claimant did such work and same was accepted and approved.

2. That by reason of such instruction and direction on the one part and performance on the other an implied agreement within the purview of the act of March 2, 1919, arose whereby the Government is obligated to reimburse the claimant for the amount so expended.

3. That certificate C issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.



JUNE 8, 1920.

**Cases Nos. 2309 and 2310.**

*In re* **CLAIM OF CLEVELAND CRANE AND ENGINEERING CO.**  
(REHEARING).

1. **MISTAKE—REFORMATION OF CONTRACT UNDER ONE.**—The Secretary of War can only reform contracts on the ground of mistake under such circumstances as would justify a court of equity in reforming a contract.
2. **SAME.**—In order to justify the reformation of a contract on the grounds of mutual mistake the testimony must be clear and cogent and must establish a mistake of a fact having a present or past existence and must show that at the time of the execution of the contract the parties intended to say a certain thing and by mistake expressed another.
3. **REFORMATION OF CONTRACT—MISTAKE, EVIDENCE OF.**—Where claimant and representatives of the Government make different contentions with reference to their respective rights under a previous contract in negotiating a settlement thereunder, and with full opportunity to obtain counsel and advice, claimant executed the settlement contract, such settlement contract is a binding obligation upon claimant.
4. **RESCISSION DURESS.**—Where a claimant with full knowledge of all the facts and with ample time and opportunity for investigation, consultation, and consideration, and after consulting with its attorney, enters into a contract, such contract will not be abrogated on the grounds of duress.
5. **SETTLEMENT CONTRACT AND STATUTORY AWARD—APPROVAL BY CLAIMS BOARD.**—Where a claimant is advised that a settlement contract signed by it and a statutory award accepted by it are not binding until approved by the Claims Board, and claimant is advised that it may withdraw its signatures at any time before the formal acceptance by the Claims Board and claimant after consulting with its attorney does not request permission to withdraw its signatures before the Claims Board acts thereon, such settlement contract and statutory award are binding upon the claimant.
6. **CLAIM AND DECISION.**—Claims for approximately \$40,000, appealed from the decision of the Claims Board, Ordnance Department. Held, on rehearing, that claimant is not entitled to recovery.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, on two claims for approximately \$40,000, one on

a formally executed contract, the other on an informally executed contract, under the following circumstances:

2. These two claims were previously before the Board of Contract Adjustment, and on March 27, 1920, this Board issued a decision and transmitted same to the claimant for acceptance, but before said acceptance was received correspondence with the Claims Board, Ordnance Department, revealed the fact that the decision so rendered was based upon an erroneous understanding of the position of the Ordnance Claims Board, and that a grave jurisdictional question was involved. Thereupon the said decision was withdrawn, and both the claimant and the Claims Board, Ordnance Department, notified that the cases had been set for rehearing on Tuesday, May 18, 1920.

3. Upon the date so set the cases came on for rehearing before the Board of Contract Adjustment, at which hearing the claimant was represented by its secretary and general manager and by counsel, and the Ordnance Claims Board and the Government were represented.

4. The claimant company was engaged in the manufacture of steel shell forgings for the United States Government under two contracts, the first being War-Ord. G1014-541A, dated January 1, 1918, for one hundred and forty thousand 5-inch common steel shell forgings. The claim arising under this contract has been given claim No. 150-C-2310. This contract is proxy signed, and therefore becomes informal.

5. The second, War-Ord. P5339-1982A, dated April 30, 1918, for twenty-five thousand 5-inch common steel shell forgings. The claim arising under this contract has been given claim No. 150-C-2309. This contract is a formally executed contract.

6. The two contracts are substantially identical in their terms.

7. Shortly after the armistice suspension of performance on both contracts was requested by the United States and acceded to by the claimant, and negotiations for settlement of all matters arising under the contracts were entered into and tentative terms agreed upon between the claimant and a subcommittee of the Cleveland district ordnance board. At a later date, to wit, on or about July 19, 1919, the claimant company, represented by C. C. Robbins, its secretary and general manager, and J. B. Shaver, its sales representative, and a quorum of the Cleveland district ordnance board, held a meeting for the purpose of reaching an agreement as to the terms upon which a final settlement should be based.

8. At this meeting it was brought to the attention of the Cleveland district ordnance claims board that approximately 10,000 shell forgings, which were termed "doubtful forgings," had been sold subsequent to the termination and prior to July 19, 1919, by the Cleveland

Crane & Engineering Co. to the Cleveland Products Co., and it appearing to the members of the Cleveland district ordnance board that such a sale was in violation of the terms of the contract, and, in their opinion, was a conversion of Government property, and that by reason of said conversation the Government was entitled, in the settlement then being negotiated, to the full amount which the Cleveland Crane & Engineering Co. had received for the said doubtful forgings. This was brought to the attention of the representatives present of the claimant company, and they were told that the tentative terms negotiated with the subcommittee of said board would not be acceptable to the Cleveland district ordnance claims board, and that restitution must be made to the Government by payment to the Government for the material in the said doubtful forgings at a price of \$70 per ton, which was the cost to the Government of the raw material and also was approximately the price received by the contractor from the sale thereof.

9. The representative of the claimant disclaimed any wrongful intent in the sale of the said forgings and claimed that under the provisions of the contract the said doubtful forgings were the property of the Cleveland Crane & Engineering Co.; that the claimant had a right to dispose of same and could only be required to account to the Government by replacing pound for pound the raw material in said forgings, or if the Government did not desire the raw material, then to pay the Government for same at the then prevailing market price, which said price was approximately \$20 per ton.

10. The members of the Cleveland district ordnance claims board, acting on the advice of the legal adviser of the board, who was present, did not consider that claimant's construction of the contract was tenable, and held that settlement could only be effected by paying to the Government approximately \$70 per ton for the raw material in the said doubtful forgings.

11. The claimant, through its representatives, finally agreed to a settlement contract upon the terms insisted upon by the Cleveland district ordnance claims board, and the meeting was adjourned so that the necessary papers and contracts could be reduced to writing.

12. On another day, to wit, on the 29th day of July, 1919, the same representatives of the claimant company appeared again before the board, and the settlement contracts having been prepared the same were executed by the Cleveland district ordnance claims board on behalf of the Government and on behalf of the claimant by C. C. Robbins, its secretary and general manager.

13. Contract P5339-1982A, dated April 30, 1918, being a formally executed contract, a separate and distinct settlement contract was drawn up, which said settlement contract recites:

## SETTLEMENT CONTRACT.

"This contract made this 29th day of July, A. D. 1919, between the Cleveland Crane & Engineering Co., a corporation organized and existing under, and by virtue of, the laws of the State of Ohio, and having an office at Wicliffe, Ohio, party of the first part (hereinafter called 'contractor'), and the United States of America by A. O. Ellis, Capt. Ord. Dept. U. S. A. (hereinafter called 'contracting officer'), acting by direction of the Chief of Ordnance, United States Army, and under authority of the Secretary of War, party of the second part:

"Whereas a certain contract was entered into between the United States and the contractor numbered War-Ord. P-5339-1982-A dated April 30, 1918 (hereinafter called 'original contract,' which term also includes, wherever used herein, all agreements or orders, if any, supplementary to said contract, except this agreement); the total number of finished units or amount of work delivered or accepted on or before the date of this contract, and under and in performance of the original contract, is 40,767 5-inch steel shell forgings.

"Whereas the furnishing and delivery of further articles or work under said original contract will exceed the present requirements of the United States; and

"Whereas it is in the public interest to terminate said original contract as herein provided, and the execution of this contract is in the financial interests of the United States; and

"Whereas, pursuant to the original contract, the contractor has incurred expenses and obligations for the purpose of furnishing and delivering articles or work remaining undelivered under said original contract: and

"Whereas the contractor is willing to accept termination of said original contract and to forego such profits as might have accrued to it from the completion of said original contract and to accept this contract in lieu of said original contract and any and all claims and demands of every nature whatsoever arising, or which may arise, out of said original contract; and

"Whereas the contractor is willing to waive any and all rights that it may have under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination.

"Now, therefore, in consideration of the premises and of the mutual covenants herein contained it is agreed between the parties hereto as follows:

"1. *This contract supersedes and takes the place of said original contract, which is hereby terminated*, and the contractor hereby releases the United States from any and all claims, of every nature whatsoever, arising out of said original contract, under and in pursuance of said original contract, and not yet paid for, shall be paid for in accordance with the provisions of said original contract as if it had not been terminated.

\* \* \* \* \*

"3. The United States shall forthwith pay to the contractor the sum of three thousand two hundred seventy-six and 33/100 dollars (\$3,276.33) in full and final compensation for all articles or work

delivered, and for all services rendered and all expenditures incurred by the contractor, under the original contract, and in the full satisfaction of any and all claims or demands in law or in equity, which the contractor, his successors, representatives, agents, or assigns may have growing out of or incident to said original contract; and said contractor hereby expressly agrees that such settlement when made shall constitute a complete termination of every question or claim, legal or equitable, liquidated or unliquidated, by or on behalf of the contractor, pertaining to or growing out of said original contract.

\* \* \* \* \*

“6. This agreement shall not become a valid and binding obligation of the United States unless and until the approval of the Claims Board of the Ordnance Department has been noted at the end of this instrument.

\* \* \* \* \*

“9. It is specifically understood and agreed by and between the parties hereto that all reference hereinbefore made in regard to the termination of the original contract, dated April 30, 1918, shall be construed to mean that said *original contract is terminated in every respect*, with the following exception, to wit, that the claim of Anderson & Gustafson, of Cleveland, Ohio, for fuel oil, amounting to the sum of \$4,512.73, as set forth on form eight (8), sheet three (3), line twenty-nine (29), and referred to in the staff report on page six (6), is reserved for further consideration and adjustment by and between the parties hereto.”

14. This contract was signed on behalf of the Cleveland Crane & Engineering Co., contractor, by C. C. Robbins, secretary and general manager; on behalf of the United States of America by A. O. Ellis, captain, Ordnance Department, United States Army, contracting officer; was approved by the Ordnance Department Claims Board by Harry A. West, first lieutenant, Ordnance Department, United States Army, on August 20, 1919, and also approved by the War Department Claims Board, by Ira L. Reeves, colonel, Infantry, member, August 19, 1919.

15. Contract War-Ord. G1014-541A, dated January 1, 1918, being an informal contract was covered by a *statutory award under the act of March 2, 1919*, and recites:

#### “STATUTORY AWARD FORM 1.

[“Claim No. C-BC 1322. War Order G-1014-541-A.]

“AWARD OF SECRETARY OF WAR UNDER THE ACT OF CONGRESS ENTITLED ‘AN ACT TO PROVIDE RELIEF IN CASES OF CONTRACTS CONNECTED WITH THE PROSECUTION OF THE WAR, AND FOR OTHER PURPOSES’ (APPROVED MAR. 2, 1919).

“1. It appearing to the satisfaction of the Secretary of War that an agreement was entered into in good faith between the Cleveland Crane & Engineering Co., the claimant, and R. P. Lamont, lieutenant



colonel, Ordnance Department, United States Army, an officer or agent acting under the authority, direction, or instruction of the Secretary of War, on or about the 1st day of January, 1918, during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war; that the agreement had been performed in whole or in part, or expenditures had been made or obligations incurred by the claimant on the faith of such agreement, prior to November 12, 1918; that the agreement had not been executed in the manner prescribed by law; that the said agreement is within the provisions of the above-entitled act of Congress; that the nature, terms, and conditions of said agreement are set out in Form C, certificate of the Claims Board of the Ordnance Department; that the claimant presented his claim to the Secretary of War before June 30, 1919; that there have heretofore been delivered by the claimant and accepted by the United States under said agreement 128,291 5-inch steel shell forgings of the fair aggregate value of \$250,167.45, said sum paid or to be paid; that the sum of \$27,907 paid by the claimant to the United States Government will adjust and discharge such agreement upon a fair and equitable basis, and that the settlement agreed upon under this award does not include prospective or possible profits on any part of the agreement beyond the goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures and obligations or liabilities incurred in performing or preparing to perform said agreements.

"2. The Secretary of War hereby awards to said claimant the sum of \$2,382.70, which sum, together with the payment by the contractor to the United States Government of the sum of \$27,907, shall be in full adjustment payment and discharge of said agreement, payment of which has been tendered."

16. This award was executed on behalf of the Government by the Cleveland district ordnance claims board, by J. Scobell, chairman, and on behalf of the Cleveland Crane & Engineering Co., by C. C. Robbins, secretary and general manager, under date of July 29, 1919; by the Claims Board, Ordnance Department, by William E. Fowler, lieutenant colonel, Ordnance Department, United States Army, member, August 23, 1919; approved by authority of the Secretary of War, War Department Claims Board, by Ira L. Reeves, colonel, Infantry, member, August 23, 1919.

17. On July 26, 1919 (p. 140), Mr. J. B. Shaver, while in Washington on behalf of his company in connection with an entirely different matter, called upon Messrs. H. Stanley Hinrichs and F. S. Bright, attorneys at law, Washington, D. C., to consult with them relative to the business which had brought him to Washington, and after arranging matters in connection with the business which had brought Shaver to Washington he mentioned to the attorneys, or one of them, the settlement which had been negotiated with the Government. Nothing definite was done at that time, but on August 4,

1919, the Cleveland Crane & Engineering Co. by telegraph requested an interview with these attorneys in Washington on August 6. This interview was arranged. Mr. Shaver brought contracts and consulted fully with the attorneys, and the attorneys on that day called upon the Ordnance Claims Board in Washington to obtain information in connection with the matter and were told by the recorder of the Ordnance Claims Board that the settlements were not considered final until approved by the Ordnance Claims Board, and that any time before the Ordnance Claims Board approved same that the claimant had the right to withdraw its signature from the contracts, and that in that event a hearing could be given.

18. As a result of these various interviews, the attorneys became convinced that the settlement agreement entered into was inequitable and unjust and that the Cleveland district board had erred in its construction of the original contracts, and advised Mr. Shaver that the proper procedure was for the Cleveland Crane & Engineering Co. to withdraw its acceptance of the agreement, as the same had not at that time been approved by the Ordnance Claims Board, and then to prosecute an appeal before the proper boards from the decision of the Cleveland district claims board and prepared for the signature of the proper official of the Cleveland Crane & Engineering Co. the following two letters:

“ CLEVELAND, OHIO, *August 7, 1919.*

“ F. S. BRIGHT, Esq.,

“ *Colorado Building, Washington, D. C.*

“ DEAR SIR: We are handing you herewith a communication to the Ordnance Claims Board, asking leave to withdraw our acceptance of the settlement hereinbefore made in the matter of claim No. 457 (G1014-541A), contemplating a settlement of items in controversy under contracts between this company and the Ordnance Department of the United States Army, dated January 1 and April 30, 1918.

“ In the event that the Ordnance Claims Board shall refuse to permit us to withdraw our acceptance of said settlement, we desire to withdraw the claim from said Board and prosecute the matter before the Court of Claims. This letter is intended as authority to you, as our attorney, to withdraw the claim from said Board in the event that said Board shall decline to reopen the settlement.

“ Yours, truly,

“ \_\_\_\_\_.”

“ CLEVELAND, OHIO, *August 8, 1919.*

“ ORDNANCE CLAIMS BOARD,

“ *War Department, Washington, D. C.*

“ GENTLEMEN: In the matter of claim No. 457, filed through the Cleveland district claims board (G1014-541A), contemplating a settlement of items in controversy under contracts between this company and the Ordnance Department, United States Army, dated



January 1 and April 30, 1918, we earnestly desire and therefore ask leave to withdraw our acceptance of the settlement heretofore made and ask that the claim be reopened.

"The settlement was accepted by this company without any legal advice whatsoever and in the belief that the terms of said settlement (which was never considered fair or equitable by this company) were the only ones to which the Government would assent, and in the belief that it was necessary for us to act within three days after the contract of settlement was presented to us.

"An official of this company went to Washington fully intending to take up the matter with our attorneys on Saturday, July 26, but, because of unexpected developments in connection with another case which required immediate settlement, was unable to take up this case. We have now, however, been advised by our attorneys that the settlement heretofore made is unfair and inequitable and directly contrary to our contractual rights. As we now understand those rights, the said settlement was made under a misapprehension of the facts and was based upon misinformation as to what were our rights and obligations in the premises. We believe that upon a reconsideration of the claim it will be apparent to the Government that an entirely different settlement is required to meet the ends of justice.

"Respectfully,

"\_\_\_\_\_."

19. Mr. Shaver carried these letters to Cleveland and presented them to Mr. Robbins, the secretary and general manager of the claimant company. The claimant company *did not sign either* of the two letters, did not accept the advice of its attorneys, refused to withdraw its signature and acceptance on the two settlement contracts, but on August 9, 1919, the following telegram was sent to its attorneys:

"WICKLIFFE, OHIO, August 9, 1919.

"F. S. BRIGHT,

"Colorado Building, Washington, D. C.:

"Items in controversy between Government and ourselves were exhaustively negotiated with local board of Cleveland, which assured us no more favorable settlement would be made. This fact, coupled with your statement that the Washington Board intimated that if we ask for a reopening of the settlement more onerous terms might be imposed upon us, induces us to hesitate before asking that the settlement be reopened. It seems to us though that the Government officers should not desire to force upon us an inequitable settlement, and this telegram authorizes you to request the Claims Board at Washington to permit you as our attorneys to present points of law and see that considerations which are proper to be urged in our behalf are brought to their attention.

"CLEVELAND CRANE & ENGINEERING Co."

"11.17A."

20. This telegram Mr. Hinrichs carried to the Ordnance Claims Board and presented same to Mr. Dwight D. Graves, recorder of

said Claims Board. In testifying as to what took place at that interview Mr. Hinrichs says:

"However, I am positive that he told me that he could not promise what action the Board would take on that telegram, that that would have to be settled by the Board itself; all that he could do was to present that telegram to the Board, and that he did not know any reason why the Board would not give us a hearing on the strength of that telegram. I can not remember positively that he stated positively that we would be given a hearing or that he would notify us if we were not to be given a hearing. It is a long time since then, and I can not remember what he said, but what he said led me to believe that there was no doubt but what we would get a hearing before that Board on the strength of that telegram. I knew that he and this gentleman in uniform had stated that at any time before the Ordnance Claims Board approved that contract we had the right to withdraw our acceptance.

"Now, as a lawyer I believe that with our acceptance on that contract we were in the position of negotiating for a square deal; with our acceptance off of that contract we had no contract at all, and we were bound to get a square deal, or we did not have to agree to anything. We could go right to the Court of Claims, and so, even though I had that assurance of Mr. Graves I was not satisfied at all, because I believe that my clients had erred in not withdrawing their acceptance, as they had the right to do. However, I did believe that we would, if the Ordnance Claims Board did not give us a hearing, withdraw it."

21. The claimant having elected not to withdraw its signature from the settlement contracts, the same came before the Ordnance Claims Board for approval and on August 29, 1919, were approved, and after such approval were forwarded to the Cleveland district board for payment of the amount as specified in the settlement contract and for the payment of the amount as specified under the award.

22. The Cleveland district board notified the claimant company that the papers had been returned from Washington approved and to call and sign the vouchers and get their money. (This about September 26.) Thereafter claimant company again consulted with these Washington attorneys and on October 18, 1919 (tr. p. 163), the attorneys for claimant filed with the Ordnance Claims Board what is alleged to be a statement of the points of law involved, said statement, however, was solely confined to a review of alleged facts *prior to the signing* of the settlement contracts on August 29, 1919.

23. The Ordnance Claims Board took the position that the settlement contracts having been duly executed by the claimant company and by the Cleveland district board on behalf of the Government and approved by the Ordnance Claims Board were final and complete settlements of all matters arising under the original contracts that the original contracts were terminated and therefore it was beyond the jurisdiction of the Ordnance Claims Board to reopen the matter.

24. From this decision the claimant appealed to the Board of Contract Adjustment and in his petition, after reciting many of the above-mentioned facts, alleges that:

\* \* \* About July 15 Messrs. Robbins and Shaver, referred to above, attended a meeting of the full Board for the purpose of completing the settlement of the contracts referred to in the caption. At that time all of the other items were settled in accordance with the agreements that had been made; but after an executive session of the Board, Messrs. Robbins and Shaver were called to the meeting, and Mr. Schobel, chairman of the Board, informed the contractor's officers that the contractor would receive nothing for the forgings of said units, and would have to pay over all that had been received from the Machine Products Co. for the said forgings (\$33,600) or else pay all that the steel had cost the Government (\$32,389.90), because the contractor 'had sold Government property.' He went on to say that no member of the Board would have agreed to any such settlement as had been proposed, with a knowledge of all the facts. Messrs. Robbins and Shaver protested that the contracting company had acted in entire good faith in the matter, and believed that they had a perfect right to sell said forgings; that both Maj. Paul Thompson and Lieut. Phillips, of the Board, had been informed of the sale at the time it was made, and no attempt at concealment or misconduct had been made by the contractor. Certain members of the Board then and there, in the presence of the officers of the contractor, talked about what had been done and voted that the contractor would have to accept the terms offered by Mr. Schobel. Judge T. L. Strimple, the legal adviser of the Board, then and there stated that the contractor was liable for prosecution for selling Government property if it did not accept the offer of Mr. Schobel. The officers of the contractor asked Judge Strimple what would be done if the contractor appealed from the decision of the Board, and if it would be agreeable to the Board for the contractor to appeal, to which said Strimple replied that 'we' (meaning the Board) 'might be soft-hearted, but we are not soft-headed.' The officers of the contractor still protested against being penalized. Mr. Hutchinson, secretary of the Board, remarked that there was nothing left for the contractor to do except to accept the settlement, and he went on to say that 'the company' (meaning the contractor) 'is lucky to get out of here in the same way they came in.'

"In view of the position taken by the members of the Board of officers, the contractor stated that if there was nothing else the contractor could do, they would accept the settlement, whereupon—it being understood that papers would be prepared in accordance with that decision—the Board adjourned.

"On the next day Mr. Shaver (referred to above) met Messrs. Schobel, Hutchinson, and Merrill of the said Board. \* \* \*

\* \* \* At this same meeting the matter of a settlement was again broached by said members of the Board, and they told Mr. Shaver that if the contractor did not accept the settlement offered by the Board the contractor would be prosecuted for selling Government property, and that the company was very fortunate to get out of it as lucky as it did. Mr. Shaver then asked why members of their own

Board had agreed to the preliminary terms, whereupon Mr. Schobel replied that he knew there was no member of this Board who would have been a party to that first settlement, knowing all the facts. Mr. Shaver replied that the company's cards were all on the table, and that there had been nothing discussed at the full meeting of the Board that had not been thoroughly discussed during the preliminary negotiations. \* \* \*

"\* \* \* Lieut. Daley has since told the said Shaver that the reason the contractor was unable to secure the same terms as other persons from the Salvage Board was that members of the Cleveland district board had advised him that the contractor had attempted to put something across which was off color, and they had the contractor in a tight corner and told him to stick it for every nickel he could on the sale of steel.

"The contractor or its officers attended no further meetings of the Board, but toward the latter part of July a Mr. Needham connected with the said district board telephoned to the contractor that the papers were ready to be signed and that the signature of the company was required within two or three days. Mr. Robbins, for the company, appeared at the office of the district board and was advised that the Board was in session and could not see him, was handed the papers to sign, and he signed them, under the belief that no better terms could be procured, without consulting any counsel or being advised of his rights or obligations other than what had been told him by members of the Board, as stated above. \* \* \*

"\* \* \* Wherefore your petitioners pray that the contractor be permitted to withdraw its acceptance of the award of the Cleveland board of both contracts referred to in caption on the grounds:

"First. That the Cleveland board erred in its advice to the contractor as to the facts in the case and the rights of the contractor in the premises, and the signature of the contractor was therefore made under a misapprehension of the facts and its rights in the premises.

"Second. That the Cleveland board was guilty of highly improper conduct in suggesting to the officers of the contractor that the contractor had sold Government property, was liable to prosecution, was lucky to get the settlement imposed, and would be prosecuted if the terms were not accepted, which statements amount to duress.

"Third. That the company was not given a hearing before the Ordnance Claims Board, and its request for a hearing was not acted upon by said Board, and the contractor notified that a hearing could not be accorded, so that it might have withdrawn its acceptance of the award prior to approval by the Ordnance Claims Board, whereby the contractor was foreclosed of its 'day in court' to which it was entitled."

#### DECISION.

1. The sole question for decision by the Board is whether the *settlement contract in the one case* and the acceptance of the *statutory award in the other* constitute such a full and final settlement and termination of the original contracts as to place it beyond the jurisdiction of the Secretary of War to enter into any further agreements thereunder.

2. It is the opinion of the Board that unless the claimant can show by clear and convincing evidence the existence of mistakes such as would justify a court of equity in reforming the settlement contracts, or can show that either fraud, accident, mistake, duress, undue influence, or incompetency existed, so that a court could rescind the said settlement contracts, then the original contracts having been terminated by the settlement contracts, the whole transaction would be closed and beyond the power of the Secretary of War to modify, there being nothing further to be done by either the Secretary of War or by the contractor.

3. The claimant, in effect, prays, first, for a reformation of the settlement contracts, alleging that said contracts were made under a misapprehension of the facts and of claimant's rights in the premises.

4. The power of the Secretary of War to reform can only be exercised where the mistakes are such as would justify a court of equity in reforming a contract. There must be either a mutual mistake of fact or, under certain circumstances, a mutual mistake of law in order to afford sufficient ground for reformation.

5. "The mistake must have been as to the intention of the parties at the time the instrument was executed, and not as affected or developed by subsequent events or by the consequences resulting from the instrument as executed, in order to justify reformation on the ground of mistake. Error in making a bargain or failure to realize as much as was anticipated is beyond the reach of chancery." (34 Cyc., 911.)

"By mutuality (of mistake) is not meant that both parties must agree on the hearing that the mistake was in fact made, but the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument, and show that at that particular time the parties intended to say a certain thing and by a mistake expressed another." (34 Cyc., 919.)

6. The instruments as drawn and executed on the 29th day of July, 1919, expressed fully the mutual agreement of the parties. They said exactly what the parties intended they should say.

7. "When an instrument is executed according to the intention and understanding of the parties at the time of execution and with full knowledge of the facts, such knowledge and execution will operate to defeat an action to reform in that it negatives mutual mistake. It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were."

8. There being no mutual mistake of fact, a mistake of law would be the only remaining ground upon which equity could reform. The general rule is that agreements entered into in good faith, but under mistake of law, are generally held valid in equity and binding upon the parties.



9. "A mere mistake of law will not affect the enforceability of an agreement, and whatever exceptions there may be to the rule will be found few in number and to have something peculiar in their character." (13 C. J., 379.)

"Against a mistake of law equity will give no relief, this is true, although such misunderstanding may have arisen from the representations of the other party." (*Griswold v. Hazard*, 141 U. S., 620, note.)

10. There is no evidence of any mistake of law. The Cleveland district claims board with a very able legal advisor construed the original contract one way. The claimant at first contended for another construction, but after discussion accepted the construction of the Board and 10 days later, with full opportunity to obtain counsel and advice, signed the settlement agreements. There is absolutely no proof that the district claims board erred in its construction and only the courts of the land can determine whether there has been any mistake of law in the construction put upon the contract.

11. The claimant's second theory appears to be that the settlement contracts were signed by claimant under duress and should, therefore, be rescinded.

12. This is a grave charge, a ground well recognized in equity upon which to base a rescission of contract, and has received the most serious and careful consideration. The Board in construing this question has not adopted the narrower and harsher rule of the common law, but has been guided by the more modern equitable rule which prescribes that:

"The test is not so much the means by which the party was compelled to execute the contract as it is the state of mind induced by the means employed. The fear which made it impossible for him to exercise his own free will." (13 C. J., 402.)

13. The two representatives of the claimant company who conducted the negotiations were before this Board at the hearing. They are not children, but mature business men, men who from their evidence and bearing are accustomed to business transactions. Neither of them testified to having been in any fear of criminal prosecution during the negotiations with the Cleveland district board. The following is the strongest evidence offered by the claimant on the question of fear, their secretary and general manager, who signed the contract, testifying as follows:

"Q. Was any statement made to you at that meeting that if you did not accept this settlement you would be criminally prosecuted?"

"A. No; I do not recall that statement being made in those words, but the inference was that we would save a lot of trouble by signing that contract.

"Q. State whether or not the statement was made that you had taken Government property, at that time.

"A. Yes, sir; the statement was made that we had taken Government property.

"Q. State whether or not it was stated to you at that time that if you did not accept that settlement worse terms would be imposed upon you.

"A. I can not recall it being stated in those exact words, but it was inferred that if we did not take it that we would get into considerable trouble; yes, sir; that is the way it was.

"Q. What was your interpretation of the meaning, or consequence, rather, of taking Government property? What did you believe would be the consequence if it could be established that you had taken Government property?

"A. Well, I knew that that would be a lawsuit and be tied up a long time, and cause no end of trouble in the end, and I thought that probably that we might be convicted of technically taking Government property."

14. There is absolutely not a scintilla of evidence as to anything taking place at the meeting of July 19, 1919, which could have induced in the minds of two such men any such state of fear as would have deprived them of the free exercise of their wills; and even if there had been, 10 days elapsed, during which time claimant could have consulted counsel, could have obtained advice as to any liability which their acts might have entailed upon them; but nothing was done, no advice was sought, and the secretary and general manager returned 10 days later of his own free will and signed the settlement contract and award.

15. "Duress will not prevail to invalidate a contract entered into with full knowledge of all the facts with ample time and opportunity for investigation, consultation, consideration, and reflection." (13 C. J., 379.)

16. From all the evidence it is clear that not only was there no duress, but that the claimant was contented with the settlement agreement until by accident a representative of claimant company, on entirely different business, mentioned the settlement in question to an attorney in Washington. Then, even after being advised by this attorney, claimant declines to authorize its attorney to withdraw the acceptance of the settlements, declines to sign the letter prepared for him requesting the ordnance claims board to reopen the case, and the evidence is uncontradicted that is late as October 31, 1919, Mr. Robbins, the secretary and general manager of the claimant company, told Lieut. Col. P. J. O'Shaughnessy that no force, moral or physical, was used in getting him to sign the contracts.

17. There are many assertions and illogical deductions made by claimant's attorney, but there is no evidence of any facts which



would constitute duress, even using the most liberal rule for determining what is duress.

18. From the facts and the law as above, this Board is of the opinion that no ground exists upon which a court of equity could either reform or rescind the settlement contracts, and the original contracts having been terminated by the settlement contract and the statutory award, it is beyond the jurisdiction of the Secretary of War to set aside said settlement contracts and reopen the question.

19. The decision of the Ordnance Claims Board declining to further consider the matters involved is affirmed.

20. Relief must therefore be denied.

#### DISPOSITION.

1. Final order denying relief will issue.

Col. Delafield and Mr. Averill concurring.

JUNE 8, 1920.

**Case No. 373.**

*In re* **CLAIM OF M. N. MAYEHOFF & CO. (INC.).**

1. **SPECIAL FACILITIES—ANTICIPATION OF CONTRACTS.**—Where at the suggestion of an inspector at claimant's plant and Army officers in charge of production and in anticipation of additional future contracts, for the manufacture of shirts claimant installed increased facilities at its plant, there is no obligation on the part of the Government to reimburse claimant for such special facilities.
2. **CLAIM AND DECISION.**—Claim for \$26,978.03 under the act of March 2, 1919, for loss on special facilities installed for the manufacture of shirts. Held, no agreement within the meaning of said act of March 2, 1919.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$26,978.03 by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claimant's petition was filed May 26, 1919, and a hearing has been had in the matter.
3. On June 4, 1918, the claimant wrote to the office of the Quartermaster General, Washington, D. C., requesting contracts for the manufacture of men's shirts.
4. After the Government had made an inspection of claimant's plant it was awarded four contracts, as follows: No. 4298-B, dated July 5, 1918; No. 5854-B, dated September 16, 1918; No. 6136-B, dated September 10, 1918; No. 7584-B, dated October 28, 1918.
5. Contracts Nos. 4298-B, 5854-B, and 6136-B were completed and paid for at contract price. Contract No. 7584-B was suspended, but has since been adjusted. Claimant was informed when contract No. 7584-B was settled that the settlement did not preclude presentation of the present claim under the act of March 2, 1919.
6. In the summer and early fall of 1918 the branch of the depot quartermaster's office at Boston, having charge of the manufacture of clothing, desired to increase the production of shirts. Sugges-

tions were made from time to time to the claimant as to machines which it could procure for increasing its production and improving its product.

7. On September 5, 1918, George L. Goodwin, a construction inspector, was sent to the claimant's plant by the Government and remained there most of the time until the first week in November, 1918. Mr. Goodwin was given a free hand by the claimant and made many suggestions. He recommended certain changes in arrangement to obtain greater efficiency; the purchase of certain machines in order to better balance the plant; that is, to make the various processes fit in together; and certain machines for the purpose of increasing production. These suggestions were complied with by the claimant.

8. The claimant's contracts called for a production of 6,000 shirts per week, and the claimant throughout the period in which it was at work for the Government maintained the required production. Toward the end of the time, due in considerable part to Mr. Goodwin's suggestions and the machines purchased upon his recommendation, the claimant's rate of production was increased to 8,000 or 9,000 per week.

9. The claimant alleged that without the suggestions of Mr. Goodwin it could have fulfilled its contracts, and it claims, in the present petition, reimbursement from the Government on account of the extra expense which it incurred as follows:

Item (a), machinery purchased-----	\$13, 776. 81
Item (b), insurance equipment-----	4, 634. 12
Item (c), altering and remodeling plant-----	5, 688. 04
Item (d), heating equipment-----	4, 577. 33
Item (e), electric equipment-----	2, 679. 49
Total-----	31, 335. 79
Less amount charged to completed portion of the contract-----	4, 377. 76
Net-----	26, 978. 03

10. In proof of an implied contract, Mr. Mordecai N. Mayehoff, president of the claimant corporation, testified to conversations with J. W. Blunt, major, Quartermaster Corps, officer in charge of the production and inspection of quartermaster supplies at Boston; with Lieut. Lawrence S. Mann, assistant to Maj. Blunt; and with Mr. George L. Goodwin, heretofore referred to, a civilian employee.

11. Mr. Mayehoff testified that Lieut. Mann suggested the purchase of a baler for baling the shirts, and certain machines for sewing. He mentioned that on one occasion he told Lieut. Mann that it would cost too much money to purchase these machines and that Lieut. Mann said:

"We need production. You need not worry about that—go ahead and buy the machines, you won't be the loser."

12. Mr. Mayehoff stated that he told his superintendent to do whatever Mr. Goodwin ordered to be done at the factory; that on the instruction of Mr. Goodwin various machines were ordered, particularly 15 double-needle machines which were ordered in October and did not arrive until after the last contract had been terminated in consequence of the armistice.

13. Mr. Mayehoff further testified that in the latter part of October or the first of November, 1918, there were rumors of an armistice and he asked Mr. Goodwin what would happen if the war suddenly stopped, and Mr. Goodwin said that Mr. Mayehoff "need not be worried." "If peace is declared to-morrow, there are lots of boys on the other side and they need shirts, and if any plant will be kept busy, this will be, because the depot appreciates what you are doing."

14. Mr. Mayehoff further testified that, being worried because he "had \$35,000 invested and was not making a dollar on the work," he sought an interview with Maj. Blunt through Lieut. Mann, and Maj. Blunt said to him: "We thoroughly appreciate what you are doing. Don't worry. We will stand by."

15. Mr. Mayehoff further testified:

"Q. Did Mr. Goodwin ever talk to you about ordering machinery?

"A. Only after they were ordered he would tell me, a day or two later, or Mrs. McMahon would tell me that Mr. Goodwin did so and so, and I would take up the question with him and find to what extent we would go, and the same conversation would usually take place, that we would be taken care of in the way of work, because they would get a great many shirts 'even if the armistice was signed to-day.'"

16. Mr. Mayehoff was asked, "When you put in this machinery, \* \* \* did you anticipate getting your money back by getting more contracts out of the Government later?" and he answered, "Absolutely."

17. Mrs. McMahon, who was superintendent of the claimant's factory and called by the claimant as a witness, testified in part as follows:

"Q. And one of the reasons why you wanted to increase production was because practically it was the policy of the plant to get more contracts from the Government?

"A. I felt that the more we could get out the more we would get.

"Q. And Mr. Mayehoff thought the same?

"A. We all felt that way, and we were told that we would be kept busy, and one lunch hour we shut off the power and talked to the girls because they were beginning to get disturbed, hearing so many rumors about the armistice.

"Q. And having that feeling in mind you, meaning the Mayehoff people, determined to receive any suggestions which Mr. Goodwin might give?

"A. Yes; I did not question him; I felt he had the privilege to do it, and it was for the good of the business."

18. The Government officers with whom the conversation had taken place testified that they had made no promise to any representative of the claimant to reimburse it for machinery or other expense.

#### DECISION.

1. It seems established that Government agents urged the claimant to increase its capacity, and to that end offered suggestions with which the claimant complied.

2. While we believe that the expenses now alleged were, in substantial part, only such as were necessarily incurred in performance of the claimant's contracts, yet it appears that at least a portion of the expense was in consequence of the claimant's compliance with the suggestions of Government agents for increasing the output of claimant's factory.

3. We do not find, however, on the evidence any promise, express or implied, on the part of the Government to make reimbursement for the expense thus incurred.

4. Both Mr. Mayehoff and Mrs. McMahon have testified that expenditures were made in expectation of further Government contracts. This is also the effect of the testimony of the Government officers who had dealings with the claimant. We do not find that they went further in the way of promises than to assure the claimant of favorable consideration when the time came to award new contracts.

5. If the armistice had not been declared, doubtless that claimant would have received the reward it expected to reap from the extension of its facilities, but the intervention of the armistice does not change the relation of the parties or create obligations where none previously existed.

#### DISPOSITION.

1. Final order will be issued denying relief to the claimant.  
Col. Delafield and Mr. Reilly concurring.

JUNE 8, 1920.

Case No. 1889.

*In re* CLAIM OF JAMES Y. WILSON.

1. **REMUNERATION—FEE.**—Where a contractor working under a cost-plus contract is required to do additional work, but which was contemplated by the parties when the contract was made, there is no obligation on the Government to pay an additional fee for such work when the contract limits the amount of the fee under said contract.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$9,188.78 additional fee and balance of contract fee. Held, no relief may be had.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the officer in charge of the Construction Division of the Army as to items hereinafter set out, under the terms of Article XIV of a contract between the claimant and the Government as follows:

*“Settlement of disputes.*—If disputes or doubts shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider itself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of the Construction Division of the Army for determination. If, however, the contractor shall feel aggrieved by the decision of that officer it shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.”

2. In view of the nature of the claim we assume that the claimant intends to exercise any rights to compensation under the act of March 2, 1919, as well as under its formal contract. The amount claimed is \$9,188.78.

3. The claim, as it now stands, is for two items, namely:

(a) Six thousand nine hundred and forty-three dollars and seventy-six cents for additional compensation alleged to be due claimant for additional work done under the contract.

(b) Two thousand two hundred and forty-five dollars and two cents, a balance alleged to be due under the \$45,000 maximum fee provided by the terms of the contract, but which has not been paid.

(c) A third item for \$362.50 was withdrawn without prejudice to presentation again after it had been passed upon by the Construction Division.

4. In the spring of 1918 the contractor, who was engaged in construction work at Camp Johnston, Fla., was found to be unsatisfactory and discharged. The claimant, who was doing other Government work, was directed to start work at Camp Johnston. It had not been determined at that time that the claimant was to be chosen as contractor to finish the work, but subsequently, about July 25, 1918, the claimant was so designated. Thereafter a contract was drawn, dated July 25, 1918.

5. This contract was what is commonly known as a cost-plus contract. Article I read in part as follows:

"The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the following work:

"Additional construction work at Camp Joseph E. Johnston, such as he may be directed in writing by the contracting officer to do, except such work in connection therewith as may be done by soldiers for military training, in accordance with the drawings and specifications to be furnished by the contracting officer and subject in every detail to his supervision, direction, and instruction.

"The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings."

Article III of the contract provided:

"As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of the completion of the work from the following schedule, except as hereinafter otherwise provided."

6. This article then provides for a sliding scale, in which scale it is recited:

"If the cost of the work is over \$500,000 and under \$1,000,000, a fee of 6 per cent."

This article also contains at the end the following provision:

"The total fee of the contractor hereunder shall in no event exceed the sum of forty-five thousand dollars (\$45,000), anything in this agreement to the contrary notwithstanding."

7. The total cost of the work done under the contract amounted to \$865,729.40, and upon this sum the claimant claims that it is entitled to a fee of 6 per cent. This claim was disallowed by the officer in



charge of the Construction Division and claimant thereupon appealed to the Secretary of War and the claim was referred to the Board of Contract Adjustment.

8. Upon this appeal a hearing has been had.

9. On July 17, 1918, the claimant was furnished with an authorization for certain work, the approximate cost of which was \$1,719. On July 18 a further authorization was given for \$740; on July 25 an authorization for \$665. On or about July 25 the claimant was handed a typewritten schedule entitled "Schedule of buildings at Camp Joseph E. Johnston, dated July 24, 1918." This schedule included numerous items, the most important of which were 82 barracks, 13 mess halls, and 4 officers' quarters. On August 12, 1918, there was a further authorization of an item to cost \$1,800; on August 31 for an item of \$4,530; on September 7 for an item of \$19,050; on September 25 for an item of \$2,500, and a further item of \$46,350; on October 5 for an item of \$500; on October 18 for an item of \$4,000; and on November 2 for an item of \$48,600.

10. The claimant proceeded with the construction of the various items included in the foregoing authorizations. Claimant's contract was dated July 25, 1918, and was signed about August 31, 1918.

11. All payments to the claimant were made under vouchers purporting to be issued under the claimant's contract. The claimant never raised any question during the performance of the contract as to whether any of the work done was outside of his contract. No record was kept by the claimant differentiating between any of the items.

12. Under the provisions of Article III of the contract the claimant would have been entitled to receive a fee at the rate of 6 per cent if the work had amounted to \$750,000; that is, \$45,000. The work, in fact, amounted to \$865,729.40, and if it had not been for the maximum clause in the contract, the claimant would have received a fee upon the additional amount over \$750,000 at 6 per cent, which is the item of \$6,943.76 now claimed.

13. At the hearing the claimant founded his case upon two theories: (1) That the schedule furnished about July 25, 1918, was intended as a part of his contract, and that he was entitled to compensation for any work not included in the schedule; (2) that his contract was intended to be limited to work amounting to \$750,000, and that he was entitled to an additional fee for any work done beyond this amount.

14. In the course of the examination of the claimant he testified that it was his understanding that the work covered by authorizations issued up to the date of the signing of the contract—that is, August

31, 1918—was done under the terms of his written contract. He was unable to state any points of difference between the work authorized up to that date and the work authorized thereafter.

15. The claimant offered in evidence the fact that Col. Chamberlain, who had charge at Washington on behalf of the Construction Division of the work at Camp Johnston, from time to time, made various estimates as to the cost of what would be required. At one time it was expected that the contract would involve \$1,250,000. Subsequently, the detention camp was eliminated from the estimates, which brought the amount down to "a little over \$750,000." Col. Chamberlain testified that it was upon the assumption that the contract would involve about \$750,000 that he fixed the maximum fee at \$45,000. He further testified, however, that the amount was constantly varying, and that the items to be constructed were constantly changed, and that any amount he might figure on was subject to amendment or reduction by the General Staff, or by reason of the failure of Congress to appropriate the necessary funds. It was not shown that the sum of \$750,000 was ever communicated to the claimant as being the amount which his contract would involve, or that he in any way relied on this being the amount, or had knowledge as to what the exact amount was. Part of the items which were included in the so-called schedule of buildings, dated July 24, 1918, was afterwards eliminated, and items were added from time to time by authorizations as hereinbefore stated.

16. The second item of the claim is for \$2,245.02. This is for a balance which is admitted to be due the claimant under the contract. The Construction Division declined to authorize payment unless the claimant would consent to having the amount reduced by subtraction of the cost of the claimant's performance bond which had already been paid to the claimant. The comptroller having ruled that the cost of this bond was not a reimbursable item under the contract, the Construction Division demanded repayment of this sum and refused to pay the balance due the claimant, except upon remission thereof. In the case of Fred T. Ley & Co., No. 760, the Board has given its opinion that the cost of a bond of this kind may be a reimbursable expense. It is understood the comptroller has under consideration at the present time the question of payment of the allowance of this amount to the claimant.

#### DECISION.

1. The claimant has argued that the language of the contract contained in Article I defining the work which was to be done thereunder is ambiguous and subject to explanation by parol evidence.

2. By the terms of the contract the claimant was to do "additional work at Camp Joseph E. Johnston such as may be directed in writing by the contracting officer," and the contracting officer was empowered "to require additional work or direct the omission of work previously ordered," and the provisions of the contract were to "apply to all such changes, modifications, and additions." We do not find this language ambiguous. The mutual intent of the parties is clear to leave it open to the contracting officer from time to time to direct such construction work at the camp as might be found necessary or advisable.

3. We have, however, received such evidence as the claimant offered as to the circumstances in order to discover whether it was fairly within the intention of the parties that the claimant should receive more than the maximum fee fixed in the contract.

4. The claimant's theory that the contract was to be confined to such work as was described in the schedule dated July 24, 1918, is refuted by the claimant's own testimony that he understood that all the items subsequent to that schedule and down to the signing of the contract on August 31 were done under the contract. No act of either of the parties appeared, contemporaneous with the performance of the contract, which gives any indication that either the Government officials or the claimant considered that he was working outside of his contract.

5. On claimant's second contention, that the amount of the contract was to be limited to \$750,000, he has offered no sufficient evidence. He has shown various estimates made from time to time by the Construction Division, but not communicated to the claimant. If the undisclosed mental processes of the officials of the Construction Division at Washington are in any way material in this case, their belief, testified to by Col. Chamberlain, that all the work was being done under the contract is equally material and neutralizes any inference which might be drawn from the fact that one time they contemplated the contract would involve about \$750,000. If this thought was in their minds, it is entirely clear that they subsequently altered their understanding of what was to be included therein. No evidence has been offered that any amount was stated to the claimant except in the regular course by written authorization.

6. In short, we do not find in this case any evidence to alter what appears to us to be the plain meaning of the contract, that the claimant agreed to perform such work as might be ordered at Camp Johnston for a maximum fee of \$45,000.

7. In respect to the controversy relating to item (b) of the claim, and particularly to the claimant's right to reimbursement for the amount paid on a performance bond, the Board makes no decision at

the present time, for the reasons, first, that we understand that the matter has not yet been finally determined by the Construction Division, and, second, that the claimant, at the hearing was not prepared to offer evidence such as might bring its claim within the decision of this Board in the case of Fred T. Ley & Co., No. 760. We accordingly give claimant the leave to withdraw item (b) without prejudice to presentation hereafter of the questions involved either to this Board or to other authority having jurisdiction of the same.

DISPOSITION.

1. In so far as this is a claim under the act of March 2, 1919, final order will issue denying relief to the claimant.

2. In so far as this is an appeal from a decision of the Construction Division the claimant's appeal is dismissed, and a copy of this opinion will be sent to the Chief of the Construction Division for appropriate action.

Col. Delafield and Mr. Hopkins concurring.

JUNE 8, 1920.

Case No. 632.

*In re* CLAIM OF BREWSTER & CO.

1. **ORAL AGREEMENTS MERGED IN WRITTEN INSTRUMENT—ACT OF MARCH 2, 1919.**—Under the well-known rule that all prior and contemporaneous oral agreements are merged in a written instrument dealing with the same subject matter, there can be no agreement within the meaning of the act of March 2, 1919, in direct conflict with the written agreement signed by the parties.
2. **REFORMATION—MISTAKE.**—A contract may not be reformed on the ground of mistake where the evidence shows that both parties intended to sign the instrument as drawn and that there was no mutual mistake as to its contents or as to any existing fact.
3. **CLAIM AND DECISION.**—Claim for \$307,930.27, presented in accordance with General Order 103, based upon a formally executed contract for airplanes. Claimant also requests relief under the act of March 2, 1919. Held, claimant is entitled neither to reformation of its contract nor to relief under the act of March 2, 1919.

Mr. Henry writing the opinion of the Board.

DECISION ON A REHEARING.

1. This claim for \$307,930.27 was presented in accordance with General Order 103, War Department, 1918. Relief was also sought under the act of March 2, 1919. A hearing was held and on April 24, 1920, the case was decided adversely to the petitioner. Subsequently the petitioner applied for a rehearing and the request was granted. No new testimony was offered, but the claim has been reargued and supplemental briefs have been filed.

2. Petitioner had a validly executed contract for airplanes, containing specific provisions to the effect that it was to provide facilities in excess of \$200,000, but that it was only to be compensated in that amount. The questions involved are: (1) Is the petitioner entitled to a reformation of its contract in order to embody therein an alleged understanding that petitioner should not be limited to compensation for facilities by the amount expressly stated in the contract? (2) May an oral agreement, within the meaning of the act of March 2, 1919, be established as the basis for the relief sought?

3. After careful consideration of the entire record, particularly the matters presented since the original decision of this Board, we are of the opinion that there was no error in that decision. There is nothing in the record to warrant reformation of the contract for mutual mistake of fact. As to the claim under the act of March 2, 1919, the express provisions of a written contract must prevail over a conflicting prior or contemporaneous agreement on the same subject matter. The act of March 2, 1919, does not dispense with this rule nor permit the finding of a contemporaneous agreement in direct contradiction of the written agreement.

4. The original opinion is affirmed in every respect and relief is denied in accordance therewith.

DISPOSITION.

1. A final order denying relief will issue. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for its information.

Col. Delafield concurring.

JUNE 8, 1920.

**Case No. 251.**

*In re* **CLAIM OF AMERICAN SASH & DOOR CO.**

- 1. FAILURE OF PROOF.**—Where the claimant's evidence was to the effect that Government officer made an oral agreement with claimant for 5,000 airplane propellers, and the Government officer denies this and says the agreement was for 1,000 only and is corroborated by letters written by the claimant, there was a failure of proof and no contract was established under the act of March 2, 1919.
- 2. ANTICIPATING CONTRACT.**—Expenditures for material to supply the supposed needs of the Government, or upon advice or assurance or expectations of future contracts are not within the act of March 2, 1919.
- 3. CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$7,274.66 for materials. Held, claimant not entitled to recover.

Mr. Henry writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1919, for \$7,274.66 by reason of an agreement alleged to have been entered into between claimant company and the United States.

2. Claimant is engaged in the manufacture of sash and door material in Kansas City, Mo., and on or about February 4, 1918, its representative called upon Lieut. Ryerson, of the propeller section of the Aircraft Production Division, relative to the manufacture of airplane propellers. It is contended by the claimant that at its conference it represented to the Government officer that it would like to have contracts for the making of airplane propellers, but that it could not afford to put in facilities and train its forces for the manufacture of these articles unless it should receive an order for at least 5,000 propellers, and it alleges and offers proof to show that it was finally agreed that a trial order should be given the claimant for 1,000 propellers at a fixed price and that after the completion of this order, if the work was done satisfactorily, additional orders up to 5,000 propellers would be awarded claimant, and that the Government officer requested and instructed it to procure the necessary material from time to time to fill orders up to 5,000 propellers. The



Government officer, however, denies this and says that a contract for only 1,000 propellers was made and that he never instructed claimant to purchase any material but merely advised him from time to time as to the character of material. At the end of the conference of February 4 the Government representative, Lieut. Ryerson, requested the claimant's representative to reduce to writing in the form of a letter his understanding of what agreement was reached at this conference, and this was done by the claimant's representative immediately thereafter. In said letter the following occurred:

"Now, as regards the arrangements entered into, my understanding is that my company shall proceed at once in the manufacture of aeroplane propellers for the Government and that you will forward an order for 1,000 oak propellers for training machines, which propellers we are to furnish complete, boxed, and ready for shipment, the price to be either \$82.50 each, or cost plus 10 per cent. As you are aware, I am not familiar with your specifications, and to start with, will be uncertain as to the cost, for which reason if you were disposed to make the contract on the same basis that you are paying for propellers from other dependable sources, it would be agreeable to me, and if, as I believe will be the case, we are in position to materially reduce the cost, we would, in that event, charge the propellers to you at the reduced cost, or make a reduction in the price on subsequent contracts.

"This is merely a suggestion for you to deal with as you see fit. My thought is, as previously stated, that we have no desire that the transaction shall yield us more than a very small profit, and I am quite sure that you do not seek to purchase the goods for less than cost.

"It is my understanding that this order for 1,000 propellers is in the nature of a test to obtain cost data and determine cost in our factories, which if found to be in line with your idea, or compares favorably with your cost for similar product from other sources, that you will in that event enter into contract with us, and we agree that upon entering into a contract involving sufficient quantity to justify the necessary equipment, we agree to produce your requirements, up to 200 propellers per day."

After the conference an order for 1,000 propellers, dated February 16, 1918, was issued, and on November 2, 1918, another order for the manufacture of 500 was given claimant, but no other orders were ever issued. It seems that the claimant purchased material for 5,000 propellers, some of which it has used and some of which it has sold, and the claim is for loss on such excess material.

#### DECISION.

1. Proceedings before this Board are somewhat informal, but there are some rules which must be observed and among these are, that the burden of proof is on the claimant to establish his claim, and where

there is a failure of proof, or the weight of the evidence is against the claimant, the claim must be dismissed. The facts here require the application of these rules. But two witnesses testify in this case, and both are entitled to equal credit. The president of the claimant company testifies and contends that at a conference with Lieut. Ryerson that an oral agreement was entered into for 5,000 propellers, but on pages 18 and 55 of the transcript he admits that he did not have a definite contract for 5,000 propellers, and on page 57 he says that he left the conference with the impression that he might receive an order for 5,000 and possibly more. Lieut. Ryerson, on the other hand, testifies (pp. 70 to 78) that there was no agreement except for 1,000 propellers, and says that he told the claimant why he could not give him a contract for a larger number. Letters written by claimant dated February 5, 1918, and February 19, 1918, show that it was the claimant's understanding that it had a contract for 1,000 only, that it hoped to get future contracts, and that the initial contract was a trial one only. These letters corroborate the Government witness. On May 28, 1918, claimant wrote the Committee on Public Information as follows:

"In anticipation of the Government's probable needs, we have purchased a large amount of lumber and some equipment, so as to be in a position to render prompt service, and we are now advised that the Government are well supplied with propellers used in connection with the training plane. *We feel very hopeful of securing orders from the Government* for combat propellers, but in the absence of positive assurance from the Government of ample orders to use up the material we have purchased for that purpose, we are desirous of getting in touch with any and all sources or people who might be interested in the purchase of propellers, and we feel very hopeful that you can provide us with such information.

"We would like to have the name of American manufacturers, as well as the names of any persons or Governments that may be placing orders for our Allies."

This is further corroborative of the evidence of Lieut. Ryerson and would indicate that claimant merely took a business risk and purchased material on what it believed was the Government need and in anticipation of future contracts.

#### DISPOSITION.

A final order will be issued from this Board denying relief.  
Col. Delafield concurring.

JUNE 9, 1920.

**Case No. 2558.**

*In re* **CLAIM OF MIDVALE STEEL & ORDNANCE CO.**

- 1. RAW MATERIALS—ANTICIPATION OF FUTURE CONTRACTS.—**Where the nature of an industry requires the purchase of raw materials in advance of receipt of orders for the finished product and claimant followed this approved practice with respect to Government contracts, which were not awarded on account of the intervention of the armistice, it must be held that claimant assumed an ordinary business risk, and that the Government, in the absence of a specific agreement, is not bound to reimburse loss caused thereby. Requests by Government agents to keep on hand a supply of raw materials in contemplation of future orders, without specifying amounts of such materials or amounts or prices of such orders, are too vague and indefinite to constitute an agreement within the meaning of the act of March 2, 1919.
- 2. CLAIM AND DECISION.—**Claim under the act of March 2, 1919, for \$136,852.83 based upon an oral agreement in relation to shell steel forgings. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$136,852.83, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. This claim is for the shrinkage value of ferrosilicon and for the cost of hot-top bricks and ingot molds, less salvage value, which the claimant purchased as a result of alleged instructions by the agent of the Government, and which it could not use on Government contracts owing to the signing of the armistice.

The claimant corporation is a well-known steel producing concern which had produced its own raw material from which it manufactured finished steel. About January, 1918, the Ordnance Department had awarded the claimant two large contracts, one for the manufacture of 8-inch shells and the other for the manufacture of 155-millimeter shell with thick walls. These contracts the claimant had

performed at its plant at Coatesville, Pa., which was equipped to do the work in manufacturing the 8-inch shells and the 155-millimeter thick-wall shells. The claimant did not obtain from the Government any additional formal contract for making the shells at its Coatesville plant, but relies on the statements made to its representatives by officers of the Government as the basis of the agreement upon which this claim is based.

3. About July, 1918, the Ordnance Department adopted a type of new 155-millimeter shell which was to have a thin outer wall. After conference between the Procurement and Production Division of the Ordnance Department and a committee of production of the War Industries Board, plans were set to shift the contractors from the production of the thick-wall 155-millimeter shells to the thin-wall shells, and the question arose whether the claimant could produce the thin-wall shells with its facilities.

4. In the first week of August, 1918, Lieut. Col. Robert A. Bruce, the officer in charge of forgings and shell bodies and of machining steel shells, Production Division, Ordnance Department, and Maj. Rodney D. Day, the officer in charge of procurement of shell forgings, projectile section, Procurement Division, Ordnance Department, went to claimant's plant at Coatesville and after making an inspection thereof had a conference the same day in Philadelphia with Mr. E. E. Slick, vice president, and other representatives of the claimant company. At this conference the claimant's representatives stated that it was losing money on its Government contracts and wanted to be relieved of them unless the price could be raised. Lieut. Col. Bruce answered that he had nothing to do with the question of price, but he would not permit the claimant's equipment to remain idle, and that the Ordnance Department would insist that the claimant's plant must be maintained so there would be no break in production at the end of the present contract, as the Government would use this equipment for the duration of the war. The claimant's representatives informed these officers that its raw materials on hand would be exhausted in a short time, and Col. Bruce instructed the claimant to keep up its equipment, forgings, and raw materials, although he did not state what raw materials the claimant should purchase nor in what amounts. He told the claimant's representatives to be prepared to continue to keep up production of shell forgings, and added that they must do so. In fact, Lieut. Col. Bruce directed the claimant's representatives to purchase all necessary material and equipment to make 8-inch and 155-millimeter shells so as to continue in the quantity of production that they were then manufacturing or increase that quantity if possible. He also said

that the Government would demand full use of claimant's plant as long as the war lasted and told claimant that it must manufacture these shells indefinitely. Lieut. Col. Bruce testified that his duties as a production officer included securing raw materials and compelling contractors to comply with their contracts and help contractors solve their manufacturing difficulties. He had no authority to make a contract or make purchases, but his function was to see that existing contracts were carried out. He testified that he did not tell the claimant that the United States would pay for the raw materials purchased at its request, and he did not specify the materials which the claimant company should purchase.

Maj. Day corroborated Col. Bruce's testimony on its material points, and further testified that the Government had requirements for six million 155-millimeter thin-wall shells, and it was evident that the claimant's facilities must be kept going. At the conference with claimant's representatives in Philadelphia Maj. Day told Mr. Neale that the Government would require the use of claimant's plant and the claimant should put itself in line to be ready to make other shells for the Government and to do each and every thing necessary to continue to do this class of work. Maj. Day did not specify what the claimant should do and he did not attempt to direct the claimant to make specific purchases. But he did say that the Government expected the claimant to continue in production as long as the war lasted.

Maj. Day had authority to make contracts and to enter into agreements for the procurement of shell forgings for the Government.

5. The evidence further shows that the claimant's supply of raw material was low and that such material had to be obtained at least 60 days in advance before the contractor could get them, and that it was not practical for contractor to get raw material for a shell contract after receiving the written contract. There was also evidence that no steel company even now can continue in production of steel without acquiring the raw materials in advance, and this condition was intensified in 1918, when the demand for steel was greater.

6. By stipulation between the claimant's attorney and attorney for the Government, there was made a part of record in this case the evidence regarding the dealings between the claimant company and Mr. J. L. Replogle, director of steel supply of the War Industries Board, which was introduced in two prior claims of the Midvale Steel & Ordnance Co., Nos. 1761 and 2563, and in the claims of the Donner Steel Co., Nos. 746 and 747. Thus through the said stipulation the following evidence taken in the former claims may be considered as part of the evidence in this claim:

In the fall of 1917, Mr. J. L. Replogle, director of steel supplies of the War Industries Board, urged Mr. A. C. Dickey, president of the

Midvale Steel & Ordnance Co., to devote its plant to the production of war materials during the continuance of the war and to make necessary provision to insure the uninterrupted maximum output of its plant for the use of the Government. Mr. Replogle also obtained priority orders for raw materials on condition that the claimant would devote its entire operations to Government work. Mr. Replogle urged the claimant to use its best efforts to increase tonnage and to get as much raw material ahead as it could, so as to keep its plant going. Mr. Replogle testified that the War Industries Board made no contracts with manufacturers but contracts were made direct with the Government departments and that the American Iron and Steel Institute acted entirely in an advisory capacity and had no governmental authority. He also testified that the allocation of the American Iron and Steel Institute directed to claimant was only a suggestion to the steel trade which generally knew that the institute acted only in an advisory capacity and that said allocation gave the claimant notice it must negotiate with the Ordnance Department for an order if it expected to get it.

7. In pursuance to request made at the hearing that the claimant furnish an affidavit setting forth the dates of purchase of each item of material and equipment on which this claim is based, there was submitted an affidavit of the chief clerk of the claimant company which shows the following facts: (a) One purchase order for ferrosilicon was given on August 5, 1918, and two other purchase orders for ferrosilicon were given on dates prior to August 1, 1918, aggregating 361 tons; (b) one order for hot-top brick was given prior to August 1, 1918, and another order on August 26, 1918; (c) various other orders for hot-top brick and cast-iron hot tops were given on various dates prior to July 10, 1918; (d) between August 2 and August 8, 552 pieces of cast-iron ingot molds were ordered; (e) the miscellaneous material ordered between September 4 and September 16, 1918, as scheduled in Statement A annexed to the claim; (f) purchase made on various dates prior to July, 1918, and up to October 8, 1918, as scheduled in Statement B annexed to the claim. The affidavit further alleges that two of the orders for ferrosilicon and one order for hot-top brick made prior to August 1, 1918, could have been canceled, but the order of cancellation was not made owing to the statements of Lieut. Col. Bruce and Maj. Day.

#### DECISION.

1. It was held in each of the prior cases of the Midvale Steel & Ordnance Co. and the Donner Steel Co., in which the testimony regarding the dealings with Mr. Replogle was introduced, which is made part of the present record by stipulation, that this evidence was insufficient to constitute an agreement within the meaning of the



act of March 2, 1919. Following these prior decisions we come to the same conclusion in this case as previously reached in the former cases. We may, therefore, reject from further consideration the evidence of the dealings between the claimant and Mr. Replogle in the determination of the present case.

2. However, the claimant does not rely wholly upon its dealings with Mr. Replogle, but also upon statements made to its representatives by Lieut. Col. Robert A. Bruce and Maj. R. D. Day, both referred to above. Thus the question arises whether such statements made by Col. Bruce and Maj. Day constitute an agreement made with the claimant that the Government would reimburse it for such losses it should occur by reason of the shrinkage value of ferro-silicon, hot-top bricks, ingot molds, and other material and equipment which the claimant purchased as a result of these alleged instructions.

3. As to any statement that might have been made by Lieut. Col. Bruce, it will suffice to state that he was merely a production officer having no authority to make a contract or to make purchases, but being charged with the location of raw materials and the seeing that existing contracts were carried out. However, Maj. Day had authority to make contracts and to enter into agreements for the procurement of shell forgings for the Government, and Col. Bruce's testimony is corroborated by him.

4. Thus we can disregard any statements as made by Mr. Replogle and Col. Bruce which are not corroborated by Maj. Day and decide the only question as to whether the statements made to the claimant by Maj. Day constitute a contract binding on the Government.

5. We do not deem it necessary to again recite the testimony, yet it seems clear that no agreement was ever entered into by which the Government promised to award the claimant sufficient contracts for a sufficient length of time so that the claimant could consume or in any way pay for the raw material which it purchased. When Maj. Day told the representative of the claimant company that the Government would require the use of the claimant's plant and that the claimant should put itself in line to be ready to make other shells for the Government and to do each and every thing necessary to continue to do this class of work, he did not specify what the claimant should do nor did he attempt to direct the claimant to make specific purchases; neither did he specify the material, price, or duration of these future orders, except that he told the claimant that the Government expected it to continue in the production as long as the war lasted. The essentials of a contract were not agreed upon and no agent of the Government having authority to contract ever promised to reimburse for the expenses it had been put to.



6. The evidence shows that the claimant's supply of raw material was low and that such material had to be obtained at least 60 days in advance before the contractor could get it, and that it was not practical for the contractor to get materials for a shell contract after receiving the written order. There was also evidence that no steel company even now can continue in production of steel without acquiring the raw materials in advance, and, of course, this condition was intensified in 1918; so it was only natural and a matter of good business risk for the contractor to keep his supply of raw materials up if he expected to get contracts. In this case the contractor expected more contracts and was making itself ready therefor, and when the war ended the claimant's future expected orders were not forthcoming. It had this material so purchased on hand, but it was a business risk which the claimant assumed and for which the Government under the facts disclosed in this case is not responsible.

It seems clear from the facts stated in paragraph 7 of the "Findings of fact" that the claimant did not purchase all or even a substantial part of the material and equipment for which it now seeks reimbursement after the conference in August, 1918, with Lieut. Col. Bruce and Maj. Day, but that much of the material was purchased long before that conference took place. These facts are perfectly consistent with the conclusions that we have reached that the claimant merely purchased the raw material and equipment in the general conduct of its business and in the exercise of sound business judgment to keep its factory supplied so that it could accept future business of whatever character was offered.

7. It is the opinion of the Board that the statements as made by the Government agents in this case were too vague and indefinite to constitute an agreement.

8. In support of the conclusions we have reached we refer to the following decisions of this Board:

9. In the Massillon Steel Casting Co., claim No. 1780, this Board decided that where an agent of the Government asked a manufacturer to increase its facilities and purchase raw materials so as to be able to take up future orders but that agent does not specify the amount of material, price, or duration of such future orders, such requests were too vague and indefinite to constitute an agreement under the act of March 2, 1919.

10. In the case of the Donner Steel Co., claims Nos. 746 and 747, Government agents urged the claimant company to use its best efforts to increase its tonnage of projectile steel and to get as much raw material ahead as it could so that claimant could keep the forging plants going. Also the manufacturer was told that the Government would use its capacity as long as the war lasted. This Board held

that such statements do not constitute an agreement within the provisions of the act of March 2, 1919.

11. This Board has repeatedly held that mere urgings and requests by Government agents upon manufacturers to increase their facilities and to keep a supply of raw materials on hand in contemplation of future orders and without specifying the amount of the material, price, or duration of these orders are too vague and indefinite to constitute an agreement under the provisions of the act of March 2, 1919.

In the case of the Bourn Rubber Co., No. 639 (2 Dec. Bd. Cont. Adj., 235) the holding of this Board, as shown by the syllabus, was as follows:

“The constant urging on the part of officers of the Government of claimant to increase its production of rubber boots from the spring of 1918 to September, 1918, when claimant was informed that the requirements of the Government were to be 5,000,000 pairs of boots delivered before July 1, 1919, and that the rubber companies would be expected to increase their production in order to meet these greatly enlarged requirements of the Government, do not constitute a state of facts from which an agreement may be implied to reimburse claimant for the cost of any increase in its facilities, even if it be conceded that the Government officers knew that it would not be possible for claimant to increase its production to meet the requirements of the Government unless the facilities of the claimant were greatly increased.

“A claimant is not entitled to reimbursement for expenditures made or obligations incurred in anticipation of future contracts.”

12. We are therefore of the opinion in this case that the statements made by the Government agents to the claimant were too vague and indefinite to constitute an agreement which the Secretary of War is authorized to adjust under the act of March 2, 1919.

13. For the reasons stated the relief prayed for be and the same is hereby denied.

Col. Delafield and Mr. Hendon concurring.

JUNE 9, 1920.

**Case No. Sales BCA-2.**

*In re* **CLAIM OF CLASSIC MILLS (INC.).**

1. **JURISDICTION—BREACH OF WARRANTY OF QUALITY.**—Where the Government sells goods at public auction by sample and the auction catalogues require the goods to be removed from the Government warehouse in 30 days from date of sale and claimant's bid is accepted by letter from duly authorized agents of the Quartermaster General's Department, the contract is an informal one since the Quartermaster General has prescribed no regulations for the sale of surplus property under section 6853b, Compiled Statutes, and if the goods sold do not comply with the sample or with the description in the catalogue and claimant has put it out of its power to rescind and return the goods, claimant, if it has a remedy against the Government, must pursue it outside of the War Department as the Secretary of War has no jurisdiction to adjust a claim for unliquidated damages on account of a breach of warranty by the Government, under an informal contract not within the provisions of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim for \$1,909.51 for unliquidated damages under General Order 103, for breach of warranty by the Government in the sale of brown osnaburg. Held, the Secretary of War has no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under G. O. 103 to adjust a dispute under the terms of a contract between the claimant, the Classic Mills (Inc.) and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold brown osnaburg. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

**FINDINGS OF FACT.**

1. On July 30, 1919, at a public auction at the Manhattan Opera House, New York City, N. Y., claimant purchased lot No. 74, which was listed in the letter of acceptance of bid for surplus property dated August 19, 1919, sale No. 3532, which was issued to claimant by the Surplus Property Division, as follows:

"Osnaburg, brown, 28'' 8 oz. 42x29, 93,147 yds. at a unit price of 20½¢, total price, \$19,095.14."

2. This material was purchased upon the faith of a sample displayed at the auction of July 30, 1919, which sample was first quality goods. It was purchased at 20½ cents per yard and delivered to claimant about the 1st of December, 1919. The auction catalogue stated among the conditions of the sale that goods "must be removed from the Government warehouse within 30 days."

3. Upon receipt of the material by claimant, two bales (about 3,000 yards) were shipped to Hudson Parker (Ltd.), Canada, who immediately complained to claimant about the condition of the material and asked that an adjustment be made. Claimant immediately inspected the material in their warehouse and found that the goods were "streaky."

4. Upon discovery of the defects in the goods claimant wrote on December 24, 1919, to Mr. M. B. Cole, Surplus Property Division, Washington, D. C., that the brown osnaburg bought from sample as first quality goods at auction of July 30, were streaky and that their customers had complained.

5. On February 11, 1920, this material was examined by Mr. David D. Davis, inspector of textiles, Quartermaster Corps, at the warehouse of the Classic Mills, Eighteenth Street, New York City, and was found to be "seconds in dyeing."

6. On March 15, 1920, Col. Purcell, Chief of the Surplus Property Division, wrote claimant that due to the condition of the goods his office was prepared to recommend to the Claims Board a refund equal to 10 per cent of the original purchase price if claimant would accept same. On March 18 claimant replied stating that such an adjustment would be satisfactory.

7. Claimant states that prior to the receipt of the letter of March 15, 1920, it had held the remainder of the material in its warehouse, but upon receipt of this letter the matter was considered closed and the goods disposed of as seconds.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract but has delivered osnaburg of second quality instead of first quality as offered and purchased by claimant at the auction sale of July 30, 1919.

2. Claimant had the privilege of refusing to accept the material or of returning it to the Government and thereupon rescind the contract entirely. The claimant did not choose to repudiate the contract altogether but accepted the property as satisfying the contract in part and now seeks to recover damages for the defect. Claimant has not and can not now offer to rescind because he dis-

posed of the property and now claims damages for breach of the contract by the Government.

3. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

4. It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government to an informal contract not coming within the provisions of the act of March 2, 1919.

5. This Board is, therefore, without authority to grant relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 9, 1920.

Case No. 2638.

*In re* CLAIM OF FORD MOTOR CO.

1. **JURISDICTION.**—Rendering an itemized bill or invoice to the Bureau of Aircraft Production prior to June 30, 1919, is a sufficient presentation of a claim under the act of March 2, 1919.
2. **IMPROPER DEDUCTION.**—Where the claimant was engaged in the manufacture of 5,000 Liberty motors under a cost-plus contract, and furnished the Government a large number of spare parts, it was improper to deduct the value of the spare parts from the amount awarded claimant on a settlement of the contract, and claimant is entitled to be paid therefor.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$7,989.93 for spare motor parts. Held, claimant entitled to recover.

Mr. Patterson writing the opinion of the Board.

This claim originally arose under the act of March 2, 1919. Statement of claim, Form B, was filed for \$4,790.88 by reason of an agreement alleged to have been entered into between the United States and claimant on or about September 6, 1918. The original claim bore this Board's No. 150-C-1618. A hearing was held thereon and a decision rendered December 2, 1919, holding that an agreement existed as alleged in the statement of claim.

Under the head of "Disposition" it is stated in that decision that "the Board of Contract Adjustment hereby transmits its decision to the *Claims Board of the Director of Purchase* for appropriate action." The designation of the bureau board is apparently an inadvertence, as the agreement found was with the Bureau of Aircraft Production, and it appears from the subsequent proceedings that the decision of this Board was actually transmitted to Claims Board, Air Service, and acted upon by it.

Claims Board, Air Service, disallowed two items of the claim as not included in the findings of the Board of Contract Adjustment. The total amount claimed in respect of these items was \$3,561.68. On March 13, 1920, Claims Board, Air Service, ordered that an award be issued claimant in the sum of \$3,849.98. Claimant declined to accept this award and appeals to this Board upon a new petition, verified May 15, 1920. In said petition, in addition to its original claim of \$4,790, it makes claim for the further sum of \$3,199.05 for additional Liberty engine parts which it alleges were

omitted from its former statement of claim through inadvertence. The total for which claim is now made is, accordingly, \$7,989.93.

Claimant relies for compliance with the provision of the act of March 2, 1919, requiring the presentation of claims based upon agreements not executed in accordance with law before June 30 of that year upon an itemized invoice for the full sum of \$7,989.93 rendered to the Bureau of Aircraft Production April 3, 1919.

A hearing was held May 19, 1920.

#### FINDINGS OF FACT AND DECISION.

1. At the times herein mentioned prior to November 12, 1918, claimant was a corporation organized and existing under the laws of Michigan. It has since been reincorporated or reorganized under the laws of Delaware.

2. In September, 1918, claimant was engaged in the performance of a contract with the Bureau of Aircraft Production, dated November 22, 1917, for five thousand 12-cylinder Liberty engines. This was a cost-plus contract. Other manufacturers at or in the neighborhood of Detroit, Mich., were also engaged in building Liberty engines. A custom had grown up in the sales section of the Detroit district office of the Bureau of Aircraft Production by which, when certain parts were needed by one contractor of which another contractor had on hand more than were required by it at the time, the latter would be directed to deliver a specified number of such parts to the former or to the district office, and the proper charge and credit entries were made upon the accounts of the respective contractors. These orders were frequently given over the telephone.

3. On or about September 6, 1918, claimant received an order over the telephone from some person not further identified in the Detroit district office, Board of Aircraft Production, to deliver to it certain Liberty engine parts. Such delivery was made to said Detroit district office on or about the date when it was received. A receipt for the articles so delivered was signed by Harry Scott, an employee of the Bureau of Aircraft Production in charge of the janitors at said Detroit district office. Said receipt described the articles by symbol numbers and the number of each of said parts included in the order. The material portions of said receipt will be found in the second column of the schedule annexed hereunto. This order was designated by claimant upon its books and records as "Direct sale No. 57721."

4. Claimant was informed that a requisition for the articles mentioned would be issued. Such a requisition was prepared and numbered 7167, but before it was issued certain parts were returned to claimant, having been rejected. The requisition was therefore marked "canceled" and was never issued.



5. A receipt for the parts so returned was given by claimant. Upon the hearing of the former claim (No. 1618) a photographic copy of this receipt was produced. Neither the original receipt nor this nor any other copy could be found at the date of the hearing on May 19, 1920, but it is stated in paragraph 2 of the decision of this Board in case No. 1618 that said receipt read as follows:

15225. Conn., red, plain end.....	108
13441. O. K. Fude.	
13422. Conn., red bolts.....	216
13251 14283. Conn., red nuts.....	216
13227. Caps .....	108
8007. Bushing .....	108

Received from Bureau of Aircraft 18 sets of rods, plain end and asst.

FORD MOTOR,  
R. C. WALKER.

It appears from the testimony that this receipt bears no date.

6. At the date of the order above set forth, September 6, 1918, the prices of the various parts therein comprised had not been fixed. Prices were fixed thereafter and at such prices the value of the articles returned as set forth in the last preceding finding was \$3,199.05.

7. The parts so returned were afterwards incorporated by claimant into Liberty engines which were accepted by the Government.

8. Lieut. Guy George Gabrielson, Air Service (Aircraft Production), was stationed at claimant's plant, Highland Park, Mich., from July 3, 1918, until May 28, 1919, as plant accounting officer. As such officer he prepared the settlement of the contract for 5,000 Liberty motors mentioned in finding 2 hereof. Upon such settlement he deducted the sum of \$7,989.93, designated as "direct sale No. 57721" as not involved or included in that contract.

9. Claims Board, Air Service, awarded claimant upon the decision of this Board the sum of \$3,561.68. The items for which this award was made will be found in the first column of the schedule hereto annexed. From a memorandum of First Lieut. John R. Wheeler, Air Service (Aircraft Production), a member of said Air Service Claims Board, it appears that the following items were disallowed as not included in the finding of the Board of Contract Adjustment:

No. 432. 14284 C/R fork and bolt nut.....	\$43. 20
No. 108. 13440 C/R forked end and bush asst.....	3, 518. 48
Total .....	3, 561. 68

10. For purposes of comparison, a schedule is annexed hereto showing by quantities and symbol numbers in the first or left-hand column, the articles for which award was made by Air Service Claims Board; in the second or middle column, the articles receipt for by Harry Scott as set forth in finding 3 hereof, and in the third

or right-hand column, the articles billed the Bureau of Aircraft Production by claimant in its invoice of April 3, 1919. This last invoice bears the O. K. of Lieut. Gabrielson as to correctness of prices.

11. As will appear from the schedule, there are discrepancies between the Scott receipt and the invoice as regards symbol numbers. The total number of parts, however, is the same in both papers—2,640. The number of parts for which award was made by Air Service Claims Board is 1,884. This excludes those parts returned to claimant as evidenced by the receipt now lost but which was before the Board upon the hearing of the original claim, and is set forth in paragraph 2 of its decision (in finding 5 hereof). According to this receipt, the parts so returned were 756 in number, which makes up the same total of 2,640. The discrepancy in the symbol numbers is seemingly accounted for by the fact that when two or more parts were assembled a new symbol number was given to the article resulting therefrom.

12. It therefore appears that on or about September 6, 1918, claimant by direction of the Government furnished it 2,640 Liberty motor parts, of which 756 were thereafter returned, the remaining 1,884 being retained and used by the Bureau of Aircraft Production. The 756 parts returned were subsequently incorporated in Liberty motors, which the Government accepted.

Upon the settlement of the contract for 5,000 Liberty motors the value of the entire 2,640 parts, being the sum of \$7,989.93, was deducted from the amount awarded claimant upon the settlement of that contract. Claimant, therefore, has never been paid for any of the 2,640 parts which are the subject of its present claim, and which the evidence shows it supplied the Government either as separate parts or as combined parts of completed engines.

13. The rendering by claimant on April 3, 1919, of the itemized invoice for \$7,989.93 to the Bureau of Aircraft Production was a presentation of its claim within the act, and its evidence establishes that the omission of \$3,199.05 from its previous notice of claim, No. 1618, was inadvertent.

14. This Board, therefore, finds and decides that claimant is entitled to the full sum of \$7,898.93, for which it now makes claim.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to Claims Board, Air Service, for appropriate action in accordance therewith.

Col. Delafield and Capt. Morgan concurring.

JUNE 9, 1921.

Case No. 2741.

*In re* CLAIM OF THE VITROCELL CO.

1. **RELEASE. CONCLUSIVENESS OF AWARD—MISTAKE.**—Where a Claims Board has made an award which was approved and accepted by claimant in full settlement of its formal contract, and it has been paid in accordance therewith, and there is no evidence of a mutual mistake or of fraud, the award and settlement are final, and claimant is entitled to no further compensation under said contract.
2. **CLAIM AND DECISION.**—Claim for \$9,137.05 for an additional allowance under the contract, which has been settled by statutory award. Held, claimant not entitled to recover.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Chemical Warfare Service disallowing a claim for \$9,137.05 alleged by claimant to have been erroneously omitted in its original settlement claim.

2. Under date of September 14, 1918, a formal contract No. GD-1693 was entered into between the Government, acting through Arthur L. Besse, lieutenant colonel, Chemical Warfare Service and the Vitrocell Co., Columbus, Ohio, but said contract not having been approved until after November 12, 1918, was treated by the Claims Board as an informal contract. This contract was for the manufacture of 1,000,000 three-ply lenses at \$0.154 each, delivery to begin not later than the week ending September 21, 1918, and at the rate of 75,000 lenses per week until completion.

3. The contractor made partial delivery of the lenses and had on hand raw material and partly finished products when production was suspended shortly after the armistice.

4. Under date of April 22, 1919, the contractor filed a statement of claim on Form A based on contract No. GD-1693 for the 1,000,000 three-ply lenses at a price of \$154,000.

5. The Claims Board, Chemical Warfare Service under date of May 21, 1919, made an award No. GD-54A to claimant in the sum of \$40,972.88, which amount was approved and accepted by the

claimant in full adjustment, payment and discharge of the said agreement. This award was paid in full in June, 1919.

6. The instant claim was filed April 7, 1920, with the Claims Board, Chemical Warfare Service and is a supplemental claim for alleged expenses incurred during the period between suspension and settlement under the award and is itemized as follows:

1. Interest on total amount claimed, 6 per cent of \$39,241.99, for 6 months-----	\$1, 177. 26
2. Traveling expenses-----	712. 66
3. Telephone and telegrams-----	7. 76
4. Office salaries, Nov. 15, 1918, to Mar. 1, 1919 (incurred pending readjustment from 100 per cent war basis to peace basis)-----	2, 900. 00
5. Factory expenses, Dec. 1, 1918, to Mar. 1, 1919 (incurred pending readjustment from 100 per cent war basis to peace basis)----	872. 92
6. Interest, overdue accounts, notes payable, and trade acceptances--	515. 56
7. Office rent for 3 months, December, January, and February (incurred pending readjustment from 100 per cent war basis to peace basis)-----	75. 00
8. Legal expense-----	2, 875. 89
Total-----	9, 137. 05

7. The claimant in its brief to the Board of Contract Adjustment comments as follows on the foregoing items:

"First. The item of interest in the amount of \$1,177.26 is interest at the rate of six (6) per cent on \$39,241.99, the amount allowed in settlement for a period of six months, being from the date of the filing of the claim until the allowance thereof.

"Second. The item of \$712.66 refers to traveling expenses incurred in making trips necessary in the settlement of the claim.

"Third. The item of \$7.66 refers to expenses incurred for telephone calls and telegrams which were necessary in the settlement of said claim.

"Fourth, fifth, seventh. These items refer to expenses incurred for office salaries, factory expenses, and office rent, respectively, incurred pending readjustment from a 100 per cent war basis to a peace basis.

"Sixth. This item refers to interest on overdue accounts, notes payable, and trade acceptances, which said interest was sustained by virtue of the delay in settlement on the part of the Government.

"Eighth. This item refers to legal expenses sustained in respect to claimant's claim."

8. The Claims Board, Chemical Warfare Service, disallowed the claim for the following reasons:

1. Because the claimant accepted full payment and released the Government from all obligations under its contract by accepting an award for \$40,972.88.

2. Because the items for which the claimant is filing claim are not properly chargeable to the Government under its contract.

3. Because these items are outside any contract or settlement with the Vitrocell Co. and there is no justification for their claim. Such items as they claim compensation for would be included in general

office expense and would be covered by overhead allowed in award. The overhead allowed in its award was unusually large, ranging from 193 per cent to 238.6 per cent on uncompleted material.

DECISION.

1. The claimant has accepted full payment and released the Government from all obligations under the contract by accepting the statutory award GD-54A, dated May 21, 1919; the Government has paid the \$40,972.88 agreed upon, and there being nothing further to be done by either the contractor or the Government the contract is terminated, and the Secretary of War has no jurisdiction.

2. The Board is further of the opinion that there was no mutual mistake of fact, such as would justify a court of equity in re-forming the statutory award, and such being the case the Secretary of War can not do so.

3. For the reasons supra relief must, therefore, be denied.

DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.

JUNE 9, 1920.

**Case No. Sales B. C. A. 7.**

*In re* **CLAIM OF CHARLES COHEN.**

1. **JURISDICTION.**—The Secretary of War has no authority to adjust a claim for damages based upon the breach of an informal contract made after November 12, 1918.
2. **SALES—ACCEPTANCE—RESCISSION.**—Where the claimant bought goods from the Government by sample and description, and receives the goods and retains them although they do not come up to sample, sells them and suffers no damage, can not have a rescission of the contract.
3. **CLAIM AND DECISION.**—Claim under G. O. 103 for \$3,287.06 on breach of contract of sale. Held, claimant not entitled to recover.

Maj. Hill writing the opinion of the Board.

This is a claim arising under G. O. 103 to adjust a dispute under the terms of a contract between the claimant and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold certain 27-inch 8-ounce bleached duck. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

**FINDINGS OF FACT.**

1. In November, 1918, claimant called on Capt. Benjamin F. Falter, Quartermaster Corps, in the office of the Surplus Property Division, Washington, D. C., and was offered certain duck. Claimant inspected the Surplus Property Division cards on which the duck was listed as "duck, bleached, 27 inch, 8 ounce, 40 by 28," and was shown a sample of the duck.

2. Claimant made an oral offer for this duck and a letter of acceptance of bid for surplus property, dated November 4, 1919, sale No. 10564 Tex., was issued to him by the Surplus Property Division listing the material as follows: "Duck, bleached, 8 ounce, 27 inch; 91,946 yards, at a unit price of 26 cents; total price, \$23,905.96." This letter provided that the goods were "to be shipped within 60 days."

3. By letter of January 5, 1920, claimant forwarded to the Boston zone supply officer a certified check for \$23,905.96. These goods were sold by claimant to his customers as 8-ounce duck, and in January

were delivered to claimant's customers without examination by claimant. Approximately 77,000 yards were sold by claimant to M. Braum Co., of New York, and by them sold to Padin Bros., New York, for export. The balance of approximately 15,000 yards were sold to other customers for export, whose names claimant was unable to furnish. Padin Bros. complained that the goods weighed less than 8 ounces.

4. At claimant's request this lot of approximately 77,000 yards was inspected on February 25, 1920, by Fred W. Sawyer, a textile inspector of the New York depot. On inspection of a number of swatches of this duck it was found that it varied in weight from 6.81 to 6.93 ounces per linear yard. Claimant stated that he would accept 6.9 ounces as the average weight of this duck.

5. The entire amount of money paid in by claimant for this material is held in a special deposit account by the office of the zone supply officer, Boston, Mass.

6. Claimant testified that in the early part of April, 1920, he was told by Lieut. Plunkett, the then contracting officer of the Surplus Property Division, Washington, that the claim had been passed upon and that there was no necessity of his holding the goods. It will be noted, however, that the goods were sold and delivered by claimant in January. Claimant further testified that the entire quantity of duck had been sold for export and had actually been exported.

7. Claimant sold as 8-ounce duck the entire quantity purchased, has received payment therefor, and has neither made or been called upon to make any adjustment with customers to whom he sold the duck. Claimant stated that he is not basing his claim upon any loss in the sale of the goods but upon the fact that he did not receive what he had purchased and that he would not have paid for the goods he received what he did pay for them as 8-ounce duck.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract, but has delivered bleached duck averaging 6.9 ounces in weight instead of 8 ounces as offered and sold the claimant by the letter of acceptance of bid dated November 4, 1919.

2. Claimant has sold the entire quantity of duck and it has been exported by his customers.

3. Claimant had the privilege of refusing to accept the duck or of returning it to the Government and thereupon rescind the contract entirely. Claimant did not choose to repudiate the contract alto-



gether but accepted the property as satisfying the contract in part and now seeks to recover damages for the deficiency in weight. Claimant has not and can not now offer to rescind because the material has been sold and delivered by him and actually exported and now claims damages for breach of the contract by the Government.

4. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

5. It is the opinion of the Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919.

6. This Board is therefore without authority to grant the relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 9, 1920.

Case No. 2436.

*In re* CLAIM OF TRUSCON STEEL CO.

1. **SUBCONTRACTS—COMMITMENTS.**—Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction and this includes interest and storage charges, when the delay in payment and deliveries was the result of Government action; but where it was the fault of the prime contractor they may not be charged against the Government.
2. **COMPROMISE—SETTLEMENT.**—Where a subcontract was suspended and afterwards reinstated on the agreement of the subcontractor to waive interest, storage, and handling charges, such charges can not be recovered from the Government by the prime contractor.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$1,277.49 interest and storage charges. Held, claimant not entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. No formal statement of claim has been filed, but the claim comes before this Board on appeal from a decision of the Claims Board, Construction Division, which treated it as a class A claim.

The claim involves the question whether charges for storage handling and interest due to delays in the performance of a subcontract as a result of the acts of the Government are proper cost commitments to be allowed a prime contractor under the circumstances in this case. The claim is presented in the name of the subcontractor. It amounts practically, however, to a request for a determination of the obligations of the prime contractor to the subcontractor in the above respects.

STATEMENT OF FACTS.

1. On the 7th day of September, 1918, the United States Government, Construction Division, entered into a formally executed contract with the Fruin-Colnon Contracting Co., of St. Louis, to furnish in the shortest possible time labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the enlargement of a plant for manu-

facturing 240-millimeter shells on property of the Scullin Steel Co. leased to the Laclede Gas Light Co.

Article II of said contract provides as follows:

*"Cost of work.*—The contractor shall be reimbursed in the manner hereinafter described for such expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items."

“(b) All subcontracts made in accordance with the provisions of this agreement.”

2. For certain steel sash required by the Fruin-Colnon Co. for performing the above contract with the Government the claimant company submitted bids acceptable to that company. On October 29, 1918, the Construction Division, through R. C. Marshall, jr., brigadier general, United States Army, by C. M. Foster, captain, Quartermaster Corps, issued a proxy-signed requisition order No. 10, directed to the claimant company, authorizing and directing said company to proceed with the immediate production of steel sash for the plant of the said Laclede Gas Light Co. The requisition order recited that the price quoted is to be f. o. b. Youngstown, Ohio, on settlement terms of “30 days net.” It further recited “Confirmation and payment of this order will be made by Fruin-Colnon Contracting Co.” and directed that the material be consigned to the United States constructing quartermaster, Laclede Gas Light Plant, account Fruin-Colnon Contracting Co. The Fruin-Colnon Co. confirmed this order, and the claimant company immediately began the manufacture of materials called for in said requisition.

3. On December 2, 1918, the Construction Division wired the claimant “to suspend all action and make no further shipments on said requisition order No. 10, dated October 29, 1918.”

The claimant, however, feeling that the manufacturer of the material had progressed so far that it was impracticable to suspend operations, completed its manufacture.

4. Negotiations then began between claimant and the Construction Division to adjust their actual obligations, whatever these might be, and continued until June 12, 1919, when claimant telegraphed the Construction Division as follows:

“To secure quick riddance of this chestnut we will, if settled at once, waive interest, storage, and handling charges, credit manufacturing cost millions, hardware and operators, as per proposition of February 12, and allow scrap value at current prices less cost of cutting to scrap or ship in lieu of scrap allowance.”

5. On July 1, 1919, the Construction Division decided to accept the claimant's proposition contained in said telegram to ship the material, and wired the claimant to reinstate the requisition of October 29, 1918. A reinstatement order was then issued dated July 1, 1919,

signed R. C. Marshall, jr., brigadier general, United States Army, in charge of Construction Division, by C. M. Foster, major, Quartermaster Corps, and sent to claimant.

6. The Fruin-Colnon Contracting Co. then confirmed this reinstated requisition order, and the claimant company shipped the materials and received full payment therefor, on August 25, 1919.

7. The claim is presented in three items. The first item is for \$107.04, interest on \$2,387.99. The latter sum represents the cost of materials shipped by the claimant on November 12, 1918, and before notification of suspension of the original requisition order was received. Payment for this shipment was received by the claimant from the Fruin-Colnon Contracting Co. on September 17, 1919. Interest on this amount is claimed from December 12, 1918, the date of payment called for in the suspended original requisition order, to September 17, 1919, the date upon which payment was actually made. The second item is for \$372.82, interest on the \$10,652.01 worth of material shipped under the reinstated order of July 1, 1919. Interest on this item is claimed from February 1, 1919, the date alleged by claimant upon which this material would have been paid for if the original requisition order had not been suspended to August 25, 1919, the date upon which payment was actually made. The third item is for storage from February 1, 1919, to July, 1919, and rehandling charges on five carloads of material. The amount of the item for these two charges is \$312.50. The claimant was paid storage and rehandling charges on this material to February 1, 1919. This item for storage and rehandling charges is, therefore, made to run from February 1, 1919, until July 21 and 26, 1919, the final shipping date of said five carloads of material.

8. The question is whether the above items of claim may be charged by the Fruin-Colnon Contracting Co. as cost commitments. The facts in the case are not disputed.

#### DECISION.

1. Under its contract of September 7, 1918, with the Fruin-Colnon Contracting Co., the Government was obligated to reimburse the prime contractor for the actual net expenditures incurred under all subcontracts made in accordance with the provisions of said prime contract. Claimant was a subcontractor of the Fruin-Colnon Contracting Co., and the provisions of the prime contract in this respect seem broad enough to cover as a cost commitment expenditures such as these claimed herein to the extent that they may be due to the act of the Government. It sufficiently appears that the claimant as a subcontractor was justified in accepting the Government's notice of December 2, 1918, as a suspen-

sion of the prime contractor's obligation to receive shipments from claimant and to pay for them in 30 days and of claimant's right to ship and be paid in 30 days. Claimant should, therefore, not be charged with unexpected expense which its prime contractor would not have inflicted on it but for the fault of the Government itself.

2. The items of claim in this case, however, do not seem to be referable to any fault on the part of the Government. Sincere efforts on both sides seem to have been made after the suspension order of December 2 to settle all differences, and as a result, the claimant in the telegram of June 12, 1919, put forward two propositions for acceptance. The first proposition was an offer to settle on the basis of pending but uncompleted negotiations between the claimant and the Government. The second was to ship the material. The Government chose the latter, and in pursuant thereto, reinstated, without change of terms, the original requisition order of October 29, 1918, by a reinstatement order of July 1, 1919. The prime contractor, the Fruin-Colnon Contracting Co., duly confirmed this reinstatement and the Government was relieved thereby of any direct contractual relations with the claimant.

Under the order as reinstated, the Fruin-Colnon Contracting Co. was obligated to the claimant to make a 30-day settlement, and by accepting the reinstatement, the claimant agreed to a 30-day settlement. The reinstatement took effect on July 1, 1919, and shipment of the material was made by claimant on July 21 and 26, 1919. There is no evidence to show why the shipments were not made earlier, but the delay is not alleged to have been due to any fault of the Government. The reinstatement order referred claimant to the Fruin-Colnon Contracting Co. for payment, and when the claimant accepted the confirmation of this order by the Fruin-Colnon Contracting Co., it agreed to look to it for payment.

3. Claimant having waived interest, storage, and handling on certain conditions and having accepted the substitution of the prime contractor as the party to whom it would look to carry out these conditions, can not resort to the Government if thereafter, through no fault of the Government, the prime contractor failed to carry out these conditions.

4. Under these circumstances there seems to be no reason why the prime contractor should be allowed to charge as items of cost against the Government any sums which it may be compelled to pay the claimant as a result of the prime contractor's default in this respect.

#### DISPOSITION.

An order denying relief will be entered.

Col. Delafield and Mr. Bowen concurring.

JUNE 9, 1920.

Case No. 2452.

*In re* CLAIM OF J. G. WHITE ENGINEERING CORPORATION.

1. **COST-PLUS CONTRACT—EXPENSES SUBSEQUENT TO ABANDONMENT OF WORK.**—A contractor under a cost-plus contract is entitled to reimbursement of necessary and reasonable expenses incurred for salaries of clerks and auditors subsequent to abandonment of work where the work was suspended by the Government under a clause of the contract calling for certain services on the part of the contractor in winding up the work. This contractual right can not be taken away by a notice of suspension which fixes an unreasonably short period for such winding up after which no expenses would be reimbursable.
2. **SAME.**—Under the above circumstances, the salaries and expenses must be directly chargeable to the work in question; hence the expense account of an employee traveling from the main office in connection with settlement of the claim can not be allowed as an item of cost under the contract.
3. **CLAIM AND DECISION.**—Claim for \$4,136.02, presented under General Order 103, arising from a validly executed contract for the construction of an aeronautical experiment station at Langley field, Virginia. Held, claimant is entitled to recover.

Mr. Williams writing the opinion of the Board.

FINDING OF FACT.

This case arises under General Order 103, War Department, 1918, and comes to this Board as an appeal from the Air Service Claims Board disallowing items aggregating the sum of \$4,136.02 alleged to have been expenditures made by the petitioner in performing work under a cost-plus contract in the construction of an aeronautical experiment station at Langley field, in the vicinity of Hampton, Va., for which disbursements, it is alleged, reimbursement should be made by the Government under the terms of the contract for the work. The facts and circumstances of the case are as follows:

1. The petitioner was operating under a certain cost-plus contract dated June 20, 1917, for the construction of an aeronautical experiment station at Langley field, Virginia, being the same contract which furnished the basis for the items claimed and discussed in a certain decision rendered by this Board in case No. 1932. That case had reference to matters of expenditure under that contract arising during the progress of the work and up to the time of its suspension on August 3, 1918. This case involves certain expenditures made by



the petitioner after the suspension of the work and during the progress of winding up. It is pertinent here to point out that the contract of June 20, 1917, provided, in effect, for the reimbursement to the petitioner, subject to certain limitations, of all the petitioner's net expenditures incurred in the prosecution of the work; and it is important that the method provided in that contract for the abandonment of the work by the contracting officer be quoted in full:

**"ARTICLE VIII.**

*"Abandonment of work by contracting officer.*—If conditions should arise which in the opinion of the contracting officer make it advisable or necessary to cease work under this contract, the contracting officer may abandon the work and terminate this contract. In such case the contracting officer shall assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have therefore, in good faith, undertaken or incurred in connection with said work; and the contractor shall, as a condition of receiving the payments mentioned in this article, execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations or commitments. The contracting officer shall pay to the contractor such an amount of money on account of the unpaid balance of the cost of the work and of the fee as will result in the contractor receiving full reimbursement for the cost of the work up to the time of such abandonment, plus a fee to be computed in the following manner: To the cost of the work up to the time of such abandonment shall be added the amount of the contractual obligations or commitments assumed by the contracting officer, and such total shall be treated as the cost of the work, upon which the fee shall be computed in accordance with the provisions of Article III hereof. When the contracting officer shall have performed the duties incumbent upon him under the provisions of this article, the contracting officer and the United States shall thereafter be entirely released and discharged of and from any and all demands, actions, or claims of any kind on the part of the contractor hereunder or on account hereof."

Other provisions of the contract will be referred to in the decision.

2. Pursuant to the above quoted article in the contract, the work at Langley field was terminated and abandoned in pursuance of a certain letter dated August 1, 1918, from the Office of the Director of Military Aeronautics to the petitioner company, as follows:

"1. The board of control of the Department of Military Aeronautics has recommended that all permanent construction work at Langley field, Hampton, Va., shall be immediately discontinued.

"2. You are, therefore, hereby notified that the contract entered into between yourselves and the Government under date of June 20, 1917, will be terminated immediately by the Government in accordance with Article VIII thereof.

"3. No additional buildings whatever will be started at Langley field, and buildings now under way will only be completed, where



not to do so would result in serious deterioration of the material already in place. Any further work to be done will be done by troop labor, although some skilled mechanics will of course be necessary, but will be hired directly by the Government.

"4. You are requested to immediately report fully to Lieut McInerney at Langley field the quantity and contract price of all material ordered for the job which has not yet been delivered, in order that a decision may be made as to whether or not the Government desires to cancel the orders.

"5. Your cooperation in the carrying out of this plan is requested and it is suggested that you begin to disband your organization at the end of the current week. You are hereby notified that by August 15 you must withdraw all of your employees from Langley field, and that after that date no expenditures made by you in connection with the work will be reimbursed by the Government except where same have been incurred prior to that date and have been authorized in advance by this section. A small clerical force may, however, be retained by you as long as is found necessary at Langley field, for the purpose of checking the vouchers covering the cost of the work done by you and presenting same in proper shape for reimbursement by the Government."

3. The work at Langley field was of considerable magnitude involving expenditures aggregating about \$8,000,000. During the progress of the work, it was necessary, of course, that the petitioner maintain at the site of the work a considerable clerical and auditing force, and this was done under the terms of the contract, and reimbursement therefor made in the usual course by the Government. The effect of the letter from the Director of Military Aeronautics of August 1 was to suspend all construction work as of the date of its receipt, namely August 3, and the petitioner began at once the demobilization of its construction force, and this was completed by August 15. In pursuance, however, of the letter of August 1, 1918, the petitioner kept at the site of the work a clerical and auditing force for the purpose of winding up the contract, which involved not only the usual clerical and auditing duties incident to construction work, but as well the preparation of papers and accounts incidental to vesting in the contracting officer the rights, benefits, and obligations of the contractor accruing under the contract. It is pertinent to remark that subsequent to August 15, 1918, there came up for settlement commitments made prior thereto aggregating upward of \$400,000, and it was not only necessary to effect complete auditing and clerical work incidental to construction work left over at the time of the abandonment of the work, but all clerical and auditing work incidental to the winding up process, to the execution and delivery of papers necessary to effect a transfer of all property to the Government, and the making and submission of certain cost data required by the contract. Reimbursement has already been made to the petitioner for a considerable sum

expended subsequent to August 15, 1918, for auditing and clerical force, and the matter involved in this case is the allowance of certain other and additional sums alleged to have been expended by the petitioner during this winding up process, which it is alleged were made in pursuance of the terms of the contract and which were necessary to the process of winding up and which should be paid. These items or groups of items will be discussed in the decision and their allowability determined upon in pursuance of certain principles announced in the decision.

#### DECISION.

1. It may be said generally that the contract of June 20, 1917, contemplated reimbursement to the petitioner of all net expenditures necessary and incidental to the performance of the work. The construction work, involving the employment of a great number of men and the purchase and handling of great quantities of plant facilities and materials, necessitated the employment during the construction work of a large force of clerks and auditors. The expenditures were properly a part of the cost of the work for which petitioner was to be reimbursed and reimbursement was made for this force without question. It was out of the question, however, that either party should have contemplated that the very moment that construction work ceased this force of clerks and auditors should also be disbanded. In fact, there were many reasons why it should not be disbanded. First of all, the work of the clerical and auditing force could not ordinarily keep abreast of the construction work, and upon the abandonment of the work there were many bookkeeping and accounting details of current matters that must perforce be carried over; secondly, there were many supplies ordered before the abandonment of the work which did not arrive until after it had been abandoned, and these are said to have aggregated something like \$400,000, and the handling of invoices, freight bills, books of record, and what not, involving the employment of a considerable force; and, thirdly, there rested upon the petitioner, under the terms of the cancellation clause, the explicit duty to "execute and deliver all such papers, and take all such steps as the contracting officer may require for the purpose of fully vesting in him the rights and benefits of the contractor under such obligations and commitments" so that the contracting officer might "assume and become liable for all such obligations, commitments, and unliquidated claims as the contractor may have theretofore, in good faith, undertaken or incurred in connection with said work."

2. It may be said, therefore, that the expenses incurred in the completion of the current auditing and clerical work incident to construction work left over after the construction work had been

abandoned, and the clerical and auditing work necessary after the abandonment of the construction work, resulting from acts done or commitments made during the progress of the construction work, and auditing and clerical work necessary and incidental to the winding up and completion of the work for the purpose of the assumption by the Government of all rights and liabilities under the terms of the contract, were as much a part of the contract of June 20, 1917, as any proper expenditures made during the progress of the construction work. In this light of the case, since the petitioner's rights with respect to such expenditures are fixed by the terms of the contract of June 20, 1917, they are not subject to be fixed or changed by the letter from the Bureau of Aircraft Production of August 1, 1918; and that letter must be regarded merely as proper notice of abandonment of the work in accordance with the terms of Article VIII of the contract of June 20, 1917.

3. The cancellation clause of the contract of June 20, 1917, expressly provides that in the winding up process the petitioner was to execute and deliver all such papers and take all such steps as the contracting officer may require for that purpose; so that in determining in this case what of such expenditures the petitioner is entitled to receive reimbursement for, we must be guided by the principle of reasonable necessity in view of the demands made upon the petitioner for the execution and delivery of papers and other steps in the process of settlement. Applying this principle we will proceed now to discuss the various items or groups of items of the claim here presented, bearing in mind that many expenditures of the character herein claimed for for services during the winding up process have already been reimbursed to the petitioner. The account upon which this claim is based is as follows:

*Expenses deducted subsequent to Aug. 15, 1918, and unpaid.*

P. P. No.	J. G. W. voucher No.	Sub-voucher No.	Classification.	Amount.
398.....	Bill E-8033.....	6055	Traveling expenses, J. W. Garland.....	\$31.20
398.....	Bill E-8077.....	6056	Traveling expenses, Reed & Swallow.....	273.30
398.....	Bill E-15414.....	6059	Traveling expenses and salaries.....	908.58
408.....	8188.....	6149	Salary and expenses, G. M. Bowes.....	234.50
Never billed.....	8211.....		Expenses and stamps.....	35.00
Do.....	8201.....		Hatter Transfer Co., loading charges.....	60.00
407.....	Bill E-14707.....	6145	Salaries.....	1,491.41
407.....	Bill E-15009.....	6146	Salaries and stationery.....	250.00
Never billed.....	8120.....		Expenses, C. F. Reed.....	68.10
Do.....			Expenses, John Vogt.....	103.10
Do.....			Expenses, H. C. Franklin.....	90.75
Do.....			Expenses, F. H. Terrio.....	90.25
Do.....			Expenses, H. R. Swallow.....	52.10
Do.....	Bill E-15784.....		Salaries, Terrio, Swallow, Franklin, Vogt..	378.40
Do.....	8198.....		Western Union Telegraph Co.....	5.72
Total.....				3,973.41

The item for expenses and stamps, \$35, the item of the Hatter Transfer Co., loading charges, for \$60, and the item of the Western Union Telegraph Co., \$5.72, were withdrawn at the hearing of this case.

4. This Board is of the opinion that reasonable necessity has been shown by the evidence to have existed for the employment at Langley field during the process of closing up the work, in addition to other employees that had been paid for the same character of service, C. F. Reed, H. R. Swallow, F. H. Terrio, John Vogt, H. C. Franklin, G. M. Bowes, John L. Boardman, and that salaries within the limits fixed and approved by the contracting officer, together with traveling expenses to and from the site of the work, if any, which have actually been paid to these men by the petitioner, should, upon the presentation of proper vouchers, be reimbursed to the petitioner by the Government of the United States in amount not in excess of that herein claimed for the purposes stated. This Board is further of the opinion that there is no liability resting upon the United States, under the terms of the contract of June 20, 1917, for any living expenses of any of the above-mentioned employees while engaged in such employment at the site of the work, no matter whether such expenditures may have been approved by any Government agent or not; and under reasonable rules in force at the site of the work there is no liability upon the Government for expenses incurred by any of the employees herein mentioned upon trips away from the site of the work while so employed, unless previous authority therefor had been granted in writing by the contracting officer.

5. The expense account of R. B. Skinner, which was made an item in case No. 1932 by this petitioner before this Board, was withdrawn from that case for consideration herein upon the theory that it was a part of the closing-up costs at Langley field. The amount of this expense account is \$162.61. This Board is of the opinion that it should not be allowed as the evidence tends to show that Mr. Skinner was traveling upon business for the main office of petitioner company in connection with the settlement of petitioner's claims against the Government, and not in such service as to make any charge growing out of his trips appropriately chargeable to the Langley field contract.

6. In respect to any salaries and traveling expenses which may be allowed hereunder the petitioner is required, as a prerequisite to such allowance, to file with the auditors of the Bureau of Aircraft Production such supporting papers as may be reasonably required.

#### DISPOSITION.

A copy of this decision will be furnished the Claims Board, Air Service, for its information and guidance.

Col. Delafield and Maj. Farr concurring.

JUNE 9, 1920.

**Case No. 1767.**

*In re* **CLAIM OF MODEL STEAM LAUNDRY.**

- 1. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$11,910.67, based upon an oral agreement in relation to a dry-cleaning plant. This Board in its decision of April 3, 1920, held that claimant was entitled to relief. On April 24, 1920, this claim together with case No. 1630, same claimant, was returned to this Board pursuant to a resolution of the War Department Claims Board requesting that this Board reconsider its decision. The case was accordingly reconsidered and further testimony taken. It is now held, that claimant is not entitled to relief since there was no agreement within the meaning of the act of March 2, 1919. For the facts see the prior decision of this Board (Vol. IV, p. 977).

Mr. Averill writing the opinion of the Board.

This case is before the Board for rehearing and from all the evidence and the record the Board finds the following to be the facts:

**FINDINGS OF FACT.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$11,910.47 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant company in the spring of 1918 was operating a Government-owned laundry located within the limits of the Government property at Camp Sherman, Ohio. There were no dry-cleaning facilities in connection with this laundry and as the camp developed the camp quartermaster found it exceedingly inconvenient and quite expensive to forward the uniforms to Columbus, Ohio, for dry cleaning and endeavored to obtain authority from Washington for the erection of a Government dry-cleaning plant to be operated in conjunction with the Government laundry. This authority he found it impossible to obtain.

3. The Government not being willing to authorize any expenditure in connection with the erection of a dry-cleaning plant by the Government, Lieut. Col. Frank L. Case, camp quartermaster, under-

took to interest D. D. Canfield, president of the claimant company, in a plan for the erection of a dry-cleaning plant on private property just outside the limits of the camp and so erected as to be conveniently near the Government-owned laundry and promised Mr. Canfield that if he or his company would erect a building suitable for the purpose and install the necessary machinery that the camp quartermaster would assist by furnishing electricity, cement, labor to make the necessary pipe connections between the laundry and the proposed dry-cleaning plant, and would permit the use of such Government machinery as was available at the camp and promised to see that the claimant should receive all of the reclamation service dry-cleaning work.

4. The volume of business was very large and in addition to the Government reclamation service work there was cleaning and pressing for a large number of officers, nurses, and other employees of the Government at the camp. The claimant was to have the entire revenue from such operation.

5. The claimant erected the building and installed necessary machinery and operated for some 12 or 15 months, the gross receipts from the plant being between \$28,000 and \$30,000. All work at the plant was discontinued in June, 1919.

6. The claimant filed claim for \$4,266.33, alleged cost of erecting the building and \$7,644.14, alleged cost of machinery installed by the claimant and alleges that by reason of an agreement entered into between the claimant and the camp quartermaster that the Government is obligated to reimburse claimant for the expenses above enumerated.

#### DECISION.

1. In order that relief may be granted under the terms of the act of March 2, 1919, it is necessary that an agreement, either express or implied, must be proven; there must be an agreement directly contemplated and resulting in an obligation.

2. In the instant case, there is absolutely no evidence of any express agreement. We must, therefore, look to all the facts and circumstances surrounding the case in order to determine whether from such facts and circumstances an implied agreement arose obligating the Government to compensate claimant for the expenditures incurred in erecting the building and providing the machinery for the dry-cleaning plant in question.

3. The claimant testified:

"He [Col. Case, the camp quartermaster] told me the Government would pay me for every item of expenses that I was put to in the dry-cleaning plant."



This statement is entirely unsupported; in fact, all the evidence negatives the probability of any such statement having been made.

The claimant also testified:

"The dry-cleaning plant was an outside issue of mine and they never would have undertaken it or got into it only through Col. Case."

4. In his sworn petition the claimant says:

"The Government was reluctant to erect a building and to install such a plant until finally the claimant offered to do so."

5. The claimant and Lieut. Col. Frank L. Case both knew that the authorities in Washington had turned down all offers looking to the Government obligating itself for the cost of such a plant. The evidence is clear that Lieut. Col. Frank L. Case had repeatedly endeavored to obtain authority for the erection of a dry-cleaning plant and that this fact was well known to the claimant.

6. It certainly can not be implied, without the most clear and convincing proof, that a Government officer with full knowledge of the refusal of his superiors to authorize expenditures for a given purpose would willfully violate such orders and promise a claimant reimbursement for expenses made.

7. The camp quartermaster in a laudable effort to remedy a trying situation enlisted the interest of the claimant, offered to furnish steam, electricity, cement, labor to make the necessary pipe connections, and permit the use of such Government machinery as was available at the camp, and promised to see that the claimant received all of the reclamation service dry-cleaning work. All of these things were well within the scope of his authority, and these things the camp quartermaster did. The claimant on his part was to secure a site, provide a building, install some machinery, and operate the plant, claimant to have the entire revenue from such operation. It was simply a business venture in which claimant ran very little risk with prospects of good profits.

8. The building and the machinery are still the property of the claimant.

9. For the reasons *supra*, the Board is of the opinion that no agreement, express or implied, within the purview of the act of March 2, 1919, was entered into between the claimant and the Government.

10. Relief must, therefore, be denied.

#### DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.



JUNE 9, 1920.

Case No. 2275.

*In re* CLAIM OF A. P. SMITH MANUFACTURING CO.

1. **PRIVITY OF CONTRACT.**—Where claimant had a subcontract to machine forgings for 3-inch shell and was directed by the Government to suspend 3-inch shell production and prepare to handle 75-millimeter shell, and after considerable delay was awarded a contract directly with the United States for the manufacture of 75-millimeter shell, a claim for loss caused by the change in the Government's program should either be presented through the prime contractor or should be based upon the contract for 75-millimeter shell subsequently awarded by the Government, since at the time of the change of program there was no privity of contract between claimant and the United States. The fact that the Government in addition to suspending the prime contractor's production, also notified the subcontractor of the change, does not constitute a novation, nor does it amount to an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$176,000 based upon an oral agreement to reimburse claimant for certain loss in connection with the manufacture of shell. Held, claimant is not entitled to the relief sought.

Mr. Henry writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim for approximately \$176,000, which comes to this Board from the Ordnance Claims Board. The claim is based upon an alleged informal agreement between the claimant and the Government to reimburse claimant for any losses that might be sustained by it on account of the cancellation by Government direction of a contract which claimant has as subcontractor of the Bethlehem Steel Co. for the machining of 150,000 3-inch common steel shells under contract war order GA-112. No hearing has been held before this Board, the case having been very fully heard before the New York District Claims Board and the Ordnance Claims Board, Washington, and the evidence there taken being before this Board.
2. On the 27th day of June, 1917, the claimant entered into an agreement with the Bethlehem Steel Co., South Bethlehem, Pa., as

subcontractor on their Government order GA-112 to machine, complete, 150,000 3-inch common steel shells in accordance with United States Army specifications, Pamphlet 452B, revised July 6, 1916. Specifications governed the manufacture and inspection of common steel shell or shrapnel at \$3.75 each, the Bethlehem Steel Co. furnishing the forgings and being paid therefor \$1.40 each.

3. On January 12, 1918, the claimant received the following telegram from Washington, D. C.:

"You are directed to change all 3-inch equipment to machine 75-millimeter shell or shrapnel of date not later than February 1, 1918, completing only such shells or shrapnel as stocks on hand necessitate. Redistribution of forgings will be made for adjustment with number of 3-inch forgings on hand.

"JAMISON, 1800 Virginia Avenue,  
"HOFFER, Ordnance."

On receipt of this telegram the claimant advised the Ordnance Department at Washington that it had some 66,000 of these shells in process of machining and 61,000 rough forgings at its plant awaiting machining. The claimant came at once to Washington and discussed the situation resulting from this Government demand to change its equipment and work, and was given a letter dated January 15, signed D. A. Franklin, major, Ordnance, Reserve Corps, by Thomas R. Jones, Ordnance, Reserve Corps, in which the Government, recognizing its command would result in great hardship to the contractor, suggests that the contractor take up with the purchase section the question of financial loss to contractor resulting from such change. Thereupon the contractor called upon Maj. Cheston of the purchase section and was advised by him that contractor would be reimbursed by the Government for any losses growing out of the change from the manufacture of 3-inch common steel shell to 75-millimeter high-explosive shell.

4. From this time forward the contractor suffered a very considerable delay because the United States could not furnish him with forgings from which to manufacture 75-millimeter high-explosive shells. The contractor's plant was practically closed from January 12 until the latter part of February, 1918, because the Fuel Administration, acting on advice from the Ordnance Department, refused to furnish coal or permit the public service corporation to furnish power. Because of this enforced stopping of work the contractor lost a large number of trained employees to other near-by munition plants and was put to an additional expense in training new employees to take their places. After resuming operations, in the latter part of February, the contractor was again, on or about March 15, 1918, required by the Government to stop putting any new work in process, and from the period March 15, 1918, up to May 15, 1918, no

new work was put into process of manufacture, which resulted in further loss of employees and in additional loss of increased overhead expenses.

5. The contractor, on or about May 15, 1918, called the attention of the Production and Procurement Divisions of the Ordnance Department, at Washington, to the fact that unless contractor was permitted to put new work in process it would lose certain toolmakers and boring-mill operators which contractor would be unable to replace at that time on account of the scarcity of that class of operators, and thereupon the officers of these divisions instructed contractor to put in process of manufacture some 10,000 of these 3-inch forgings, which it had contracted to machine for the Bethlehem Co. in order to hold these employees. Contractor was given specific instructions to "mark time" while awaiting the receipt from the Government of 75-millimeter forgings and the contractor agreed with the Government that it would do so, and that instead of machining these forgings at piecework price, as had been its custom prior to January 12, 1918, it would follow the instructions of the Government and pay these employees on an hourly basis thereafter although this would occasion an additional loss to contractor.

6. The contractor completed its operations on this lot of 10,000 forgings which it was instructed to put into process of manufacture, and on June 5 was obliged again, on account of nondelivery by the Government of 75-millimeter forgings, to lay off employees who were engaged in initial operation and to work with a considerably reduced force from June 5 up to June 25, 1918, when contractor again directed the attention of the officers of the Production and Procurement Divisions to the fact that unless instructions were given to put an additional quantity of 3-inch forgings in process of manufacture it would be obliged to lay off its toolmakers and boring-mill operators, and the contractor again suffered a considerable loss from May 25, 1918, up to June 25, 1918, by paying, under Government instructions, the employees at an hourly rate instead of at the piecework rate, and from having to break in new operators, and further, because of the continued delay of the Government in the delivery of 75-millimeter forgings so as practically to close the plant from June 5 until June 25, 1918.

7. On or about June 25, 1918, the contractor was again instructed to put in process of operation an additional lot of 10,000 3-inch forgings for the purpose of "marking time" so as to hold his organization together until the Government should be able to deliver the 75-millimeter forgings. The contractor therefore continued "marking time" until July 5, 1918, when he received a telegram from the Ordnance Department at Washington stating that there was being forwarded to him that date from the E. W. Bliss Corporation a ship-

ment of 75-millimeter forgings, whereupon the contractor suspended initial operations on the 3-inch forgings and did not put any more in process of operation but completed those which were then in process.

8. The 75-millimeter forgings were received during the latter part of July and the contractor suffered a loss from June 25, 1918, until the receipt of these 75-millimeter forgings by reason of marking time in the manufacture of 3-inch forgings and the suspension of initial operations after July 5, 1918.

#### DECISIONS..

1. There can be no doubt claimant in this case has suffered a loss as a result of the Government's change of program. The question, however, is what are claimant's legal rights and how should they be taken care of. Claimant had two written contracts. One of them was with the Bethlehem Steel Co. for the machining of 3-inch forgings; the second was for 75-millimeter forgings. The latter appears to have been with the Government. There is no copy of it in the file. There is an unverified copy of the claimant's contract with the Bethlehem Steel Co. Apparently claimant relies upon neither written contract and is attempting to establish an informal agreement between it and the Government based on the Government's conduct, first its interference with claimant's contract with the Bethlehem Steel Co. for 3-inch forgings, second, its delay in furnishing claimant with 75-millimeter forgings.

2. From the above statement of facts it appears that the Government seriously interfered with claimant's contract with the Bethlehem Co. and hampered its performance, but let us see whether the Government acted unreasonably or did anything by which it put itself under a contract obligation to the claimant.

3. When the telegram of January 12, 1918, was sent directing claimant to complete "only such shell or shrapnel as stock on hand necessitates," what was the situation, and what was the legal effect of such "direction"? It was clear to the Government at that time that there would be no further need for 3-inch shells and that the continuation of such production was nonessential. Claimant had a subcontract for the machining of 150,000 3-inch shells on which it had hardly begun. It had finished none of them, and according to its own statement it had on hand 66,000 partially machined shells and 61,000 rough forgings. The Government agreed to allow claimant to finish all of these 127,000 forgings, although it had no further use for them. Subsequently, when it was expected that 75,000 millimeter forgings would shortly be delivered to claimant, it was mutually agreed that the number of forgings to be machined was to be reduced to 90,000. The Government agreed to take the remaining

37,000 rough forgings off of claimant's hands. Then, when it turned out that there was further delay in the delivery of the 75,000 millimeter shells, on different occasions the completion of two lots of 10,000 forgings each was authorized in order to keep claimant busy. The result was that the claimant completed a total of 111,000 3-inch forgings which the Government did not want. It appeared that the Fuel Administration at one time, on advice from the Ordnance Department that 3-inch forgings were nonessential, cut off the supply of fuel from claimant's plant, but upon further advice from the Ordnance Department fuel was furnished claimant. Throughout the entire dealings of the Ordnance Department with claimant in respect to its contract for 3-inch shells the Government showed great consideration for the claimant. It did everything it could do to keep claimant busy during the time that claimant was waiting for 75-millimeter forgings.

4. Did the telegram of January 12, 1918, "directing" the claimant to complete only such stock for 3-inch shells as it had on hand create a contract relationship between it and the Government? It does not appear from the record what happened to the prime contract between the Bethlehem Steel Co. and the Government. It apparently was suspended. It is not shown in what manner, nor does it appear what has since been done by way of adjusting the prime contract. It may be that claimant has been fully compensated for the losses for which claim is made, that is, for the losses due to the slowing up and final discontinuance of its work on 3-inch forgings for the Bethlehem Steel Co. In contemplation of law the Bethlehem Co. broke its contract with the claimant, for which it is bound to make redress. It is true, claimant's contract was not performed according to its terms because of the instructions of the Government. It was the Government that abandoned the program for large quantities of 3-inch shells, and it was the Government that substituted orders for 75-millimeter shells. The usual way of putting into effect such a change of program is to deal with the prime contractors only. The Government, of course, must have negotiated with the prime contractor in this case, but it also communicated directly with the claimant, a subcontractor.

5. The question at issue then is, Did the Government by having direct dealings with the subcontractor thereby enter into a direct contract relationship with such subcontractor? Such relationship might be either by way of novation, that is, by substitution of the Government for the prime contractor in the subcontract, or by the making of an entirely new contract, leaving the subcontract as it was.

6. There was no attempt to show that there was a novation which relieved the Bethlehem Steel Co. of its obligations under the sub-

contract, and that could not be shown. Operations were continued under the subcontract until the latter part of July, 1918, when the 75-millimeter shells arrived, and throughout the entire time of the performance of the subcontract it continued to be a contract between the claimant and the Bethlehem Steel Co.

7. Claimant contends that there was an agreement entirely independent of the written contract, which should be implied by reason of what the Government did. Claimant's right to redress on the subcontract should be ample to cover all of its losses by reason of the slowing up and final suspension of such contract. And it is immaterial that the Government communicated its intentions and instructions directly to the subcontractor. What it did was in sum and substance to suspend the prime contract, and its manner of doing so did not give rise to a direct contract relationship between claimant and the Government. Claimant's rights as to the contract for 3-inch forgings are against the Bethlehem Steel Co. only. As to such contract it must be treated as a subcontractor of the Government.

8. It may then be suggested that the Government was guilty of the delays in the delivery of 75-millimeter forgings, and that such delays gave rise to a contract under the act of March 2, 1919. It is true the telegram of January 12, 1918, instructed to be ready to machine 75-millimeter shells not later than February 1, 1918, and that the first millimeter forgings were not delivered to the claimant until July, 1918. The delay may have been a breach by the Government of its obligations under the contract for 75-millimeter forgings. The facts necessary to determine such a question are not before this Board. Whatever rights claimant has must be worked out from the 75-millimeter contract. The delays of the Government did not give rise to a separate agreement.

9. It is the opinion of this Board that claimant has failed to establish an agreement within the meaning of the act of March 2, 1918.

#### DISPOSITION.

A final order will be issued denying relief.  
Col. Delafield concurring.



JUNE 9, 1920.

No. 2357.

*In re* CLAIM OF MARSH MARKET CANNING CO.

1. **SALE BY SAMPLE.**—Where the claimant was required to hold a part of its 1918 pack for Government use, and claimant complied, and after examination of a number of sample cans the entire lot was accepted, this completed the contract, and the Government was bound although the tomatoes were inspected and rejected several months later.
2. **IDEM.**—Where the purchase order provided "Goods guaranteed against spoils and swells until July 1, 1919," any inspection and rejection by the Government after acceptance must be confined to that defect and cause for rejection only.
3. **INSPECTION.**—Where goods are sold by sample and are subsequently inspected, they must be compared with the sample.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$10,278.73 on canned tomatoes. Held, claimant entitled to recover.

Mr. Eaton writing the opinion of the Board.

#### FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$10,278.73, by reason of agreements alleged to have been entered into between the claimant and the United States.

2. The claimant is a partnership composed of Herbert A. Drummond and Zadok S. Mears, jr., doing business under the name of the Marsh Market Canning Co., and located at Hallwood, Va.

3. The partnership was formed in 1918. Its members had had no experience in the canning of tomatoes. It purchased tomatoes from the farmers of the eastern shore of Virginia who were located not far from its plant. The services of a man familiar with the process of canning tomatoes were secured.

4. The claimant was assisted in the financing of its business by the John Boyle Co., of Baltimore. By the middle of October, 1918, the claimant had finished its pack of tomatoes, amounting to about 24,200 cases, all of which had been shipped to the Boyle Co. and stored in warehouses in Baltimore by October 15, 1918. The Boyle Co. acted as agents for the claimant in the sale of the to-



atoes, and had sold or agreed to sell the major portion of the claimant's pack when the claimant was informed of United States Food Administration Bulletin No. 10, dated July 30, 1918.

This bulletin stated that Government requirements for canned tomatoes were 33½ per cent of the 1918 pack. By October the percentage had been increased to 45 per cent.

5. Mr. Drummond, of the claimant firm, and Mr. Hubbard, of the John Boyle Co., called on Lieut. Albert B. Brushaber at the office of the depot quartermaster in Baltimore on October 28, 1918, and requested that the claimant be released from supplying its quota of canned tomatoes for the reason that the tomatoes had already been sold and that it was a hardship on the claimant to have to turn over so large a percentage of its first year's pack at the Government price, which was considerably lower than the market price.

Lieut. Brushaber's account of what took place at the interview of October 28, 1918, follows.

"Capt. FRAZER. When did you first meet Capt. Drummond?

"Mr. BRUSHABER. When he came up to Baltimore to see about being released from his quota of tomatoes for the Army.

"Capt. FRAZER. About what time was that?

"Mr. BRUSHABER. During the latter part of October.

"Capt. FRAZER. What do you mean by his quota of tomatoes?

"Mr. BRUSHABER. There had been a requirement that 45 per cent of each packers' output was to be turned over to the Army for that particular year.

"Capt. FRAZER. What did Capt. Drummond want to do about it?

"Mr. BRUSHABER. He wanted to be released, stated that he had already sold his tomatoes to some other party, and that by turning his quota over to the Army it would work a hardship on him.

"Capt. FRAZER. What was the price of tomatoes at that time—the latter part of October, 1918—high or low?

"Mr. BRUSHABER. It was high.

"Capt. FRAZER. What did you tell Capt. Drummond?

"Mr. BRUSHABER. I told him I had no authority to release him, that everybody had to furnish their quota, and that he would have to furnish his, and if the tomatoes had been sold he would have to go in the open market and purchase 45 per cent of the pack and deliver them.

"Capt. FRAZER. What did he then say?

"Mr. BRUSHABER. He said he would deliver them.

"Capt. FRAZER. What did he do?

"Mr. BRUSHABER. He left the office and turned the matter over to Mr. Hubbard to handle for him.

"Capt. FRAZER. Was Mr. Hubbard present with him at that time?

"Mr. BRUSHABER. Yes, sir; Mr. Hubbard was with him.

"Capt. FRAZER. What connection did Mr. Hubbard have, if any, in Baltimore?

"Mr. BRUSHABER. I understand he is the head of John Boyle & Co.

"Capt. FRAZER. Did you understand from their conversation that the tomatoes were then in the John Boyle warehouses?

"Mr. BRUSHABER. I don't recall his saying that.

"Capt. FRAZER. What happened after these gentlemen left, in regard to this tomato proposition?

"Mr. BRUSHABER. They left the office with the understanding that they would have to furnish their quota and that they would have to submit samples to be approved by us before we would issue a purchase order.

"Capt. FRAZER. Were any samples submitted?

"Mr. BRUSHABER. They were.

"Capt. FRAZER. Do you remember by whom they were submitted?

"Mr. BRUSHABER. I do not remember who they were submitted by, but as I recall it they were submitted by a representative of John Boyle & Co.

"Capt. FRAZER. Do you remember about how many samples there were?

"Mr. BRUSHABER. About six. That was the number that we required in every case.

"Capt. FRAZER. What was done with those samples?

"Mr. BRUSHABER. They were examined by me at the sample room where we did all the examining.

"Capt. FRAZER. You are familiar with the examination of tomatoes?

"Mr. BRUSHABER. I am.

"Capt. FRAZER. You have been in the grocery business a good many years?

"Mr. BRUSHABER. Yes; for nine years.

"Capt. FRAZER. You are familiar with various grade of tomatoes?

"Mr. BRUSHABER. I believe I am.

"Capt. FRAZER. What did you find the condition of those sample tomatoes to be?

"Mr. BRUSHABER. They were what we termed fair standards, nothing more than that.

"Capt. FRAZER. Nothing but fair?

"Mr. BRUSHABER. Fair standards.

"Capt. FRAZER. Were they up to the standard required by the Army under the specifications?

"Mr. BRUSHABER. Just about.

"Capt. FRAZER. What did you do then?

"Mr. BRUSHABER. Issued the purchase order.

"Capt. FRAZER. You thought they were good enough to buy, did you?

"Mr. BRUSHABER. Yes; they were equal to the sample.

"Capt. FRAZER. You issued a purchase order based on the samples?

"Mr. BRUSHABER. Yes, sir.

\* \* \* \* \*

"Mr. MAPP. Do you recall calling up Mr. Hubbard and telling him that the samples were all right, to go ahead and strap the tomatoes and get them ready for shipment?

"Mr. BRUSHABER. Yes. As I remember he asked, he said, 'As soon as you examine these, let me know' and as I remember I called him up and told him they were all right, to go ahead."

6. The evidence shows that 12 instead of 6 sample cans were taken by an employee of the Boyle Co. from the claimant's product in the warehouses and submitted to Lieut. Brushaber, and that the cans were opened and inspected under Lieut. Brushaber's direction.

7. A purchase order was issued on October 30, 1918, as follows:

**"PURCHASE ORDER.**

"1. Date: October 30, 1918.

"2. From: Depot quartermaster, United States Army, at Coca-Cola Building, Baltimore, Md.

"3. To: Marsh Market Canning Co.; address Hallwood, Va.; factory name, Marsh Market Canning Co.; location Hallwood, Va.

"4. Deliver the following articles: Tomatoes, No. 2, as per samples submitted. Mark A Depot Quartermaster, Baltimore, Md. EF Order No. 4-3939, Req. No. 417 D. 4.

"Also in conformity with inclosed specifications. This purchase order covers allotment by United States Food Administration. The attached specifications are incorporated and included in this order. To be packed in export cases as per specifications submitted. These cans shall be full packed in the trade acceptance of the term—slack filled cans shall be subject to adjustment in price and reclamation.

"This purchase order is supposed to cover 45 per cent of your pack. If 25 per cent is greater, advise and order covering balance will be issued.

"5. Total quantity: 11,000 cases (264,000 cans) tomatoes, No. 2.

"6. Unit price: \$0.09/16 (provisional).

"7. Total price: \$24,200.

"8. F. o. b. delivery point: John Boyle Co., Baltimore, Md.

"9. Schedule of deliveries: At once.

"10. Shipping directions: Lighter to terminal warehouse, Bond and Thames Streets, Baltimore, Md.

"11. Authorization No.: E. M. 1257, sub. 173.

"Goods guaranteed against spoils and swells until July 1, 1919. Spoiled and swelled goods are to be held subject to seller's order.

"By authority of the depot quartermaster.

**"LEE G. MOFFETT,**

*"Captain, Quartermaster Corps,*

*"Purchasing Quartermaster.*

"File No. 4 32-2-Pur-S. Depot No. 8 78.

"Req. No. 417 D 4. Item No. 40. ABB:FRP."

**"IMPORTANT.**

"1. Render bills in triplicate to the disbursing quartermaster, Cocoa-Cola Building, Baltimore, Md. Specify by invoice type of case to be used.

"2. Indicate on bills: Date and route shipment moved; number of packages and contents.

"3. Mail on date of shipment to above address the following advice: Order number; date and route of shipment, quantity and articles shipped, number of packages and contents thereof. Specify purchase order number thereon.

"4. Bills must be accompanied by copy of commercial bill of lading, or reference should be made to the serial number of Government bill of lading, if latter is used.

"5. All goods must be satisfactory to the purchasing quartermaster."

8. The claimant had the cans packed in export cases and strapped, and alleges that it expended about \$1,000 in so doing.

9. The tomatoes were inspected in January and February, 1919, by Mr. C. K. Davis, a civilian in the employ of the depot quartermaster at Baltimore. He rejected the entire lot. The main ground for rejection was that the tomatoes had been overprocessed or cooked too long, which resulted in an insufficient amount of solid matter being found in the cans. Another reason for rejection was that the tomatoes were "off in color," i. e., that a certain amount of green fruit was found. It was stated also that "some cans were poorly filled."

10. Neither Mr. Davis nor Lieut. Brushaber compared the contents of the cans that were opened in January and February, 1919, with the sample cans that were submitted and approved on October 28, 1918. The inspector found "no spoils or swells."

It is conceded that the contents of the cans were in merchantable condition, and there was no evidence of decay or of the presence of artificial coloring or preservative or of any other objectionable substance.

The tomatoes after being rejected were sold by the Boyle Co. at prices ranging from 90 cents to \$1.05 a dozen.

No complaint has been made by purchasers as to the quality of the canned tomatoes.

11. In January and February, 1919, the Government had all the canned tomatoes that it needed. Prices had fallen measurably. The claimant was denied the privilege of replacing its rejected tomatoes with others which would pass inspection. Lieut. Brushaber testified that he was instructed from Washington to refuse to receive canned tomatoes which should be offered to replace rejected goods.

12. The specifications referred to in the purchase order are in Q. M. C. Form 120. They provide, in section 54, page 5:

"*Tomatoes.*—No. 2½ or No. 3 cans, 24 to case. Standard quality or better. Tomatoes to be sound and ripe, free from artificial coloring matter, and packed without the addition of water, tomato pulp, or of tomato juice in excess of the amount normally present in the tomatoes."

And in section 40, page 15, under the heading "Conditions governing in the purchase of subsistence supplies":

"Any article found after delivery in a damaged condition or not like the samples or standards, the responsibility for which rests upon the seller, may be returned to him if he so desires, he bearing the cost

or return transportation and replacement, or in lieu of replacement the seller refunding the money value of the article, and if quantity amounts to one or more cases, crates, boxes, sacks, or other similar shipping unit, the cost of transportation from place of purchase to the place where the defect was discovered. If quantity was less than specified above, the refundment of transportation may be waived."

13. Bulletin No. 10 of the Food Administration, under the heading "Canned tomatoes," reads, in section 2:

"*Quality.*—Standard quality only is desired. Specifications as follows: Tomatoes to be packed of the best standard quality, of the latest crop. Tins to be well filled with sound, ripe fruit, well peeled and cored, and of good body and flavor."

And in section 21:

"*Inspection.*—The Army, the Navy, and the Marine Corps will (a) inspect the products at the point of origin (product must be labeled and cased before inspection can be made); or (b) canner may elect to submit samples to the depot quartermaster or supply officer to whom the product is to be shipped. This does not apply to string beans or salmon. Samples must be submitted of these products."

And in section 23:

"*Storage, interest, insurance.*—On tenders of peas not ordered shipped prior to October 1, 1918, or of tomatoes, corn, string beans, and salmon not ordered shipped prior to December 1, 1918, storage at the rate of two (2) cents per case per month, or part thereof, will be added, and interest at six (6) per cent per annum, together with insurance."

#### DECISION.

1. There are at least four grades of canned tomatoes—standard, extra standard, fancy, and substandard, but, as Lieut. Brushaber testified, the grades can not be "pinned down" and tomatoes are bought according to samples.

We are convinced that the bargain in this case took the form of a sale of canned tomatoes which were inspected, sampled, and approved.

2. There was no commandeering order in the form prescribed by law, and yet it is hardly consistent with the evidence to hold that the agreement which was entered into was one that the claimant desired. When Lieut. Brushaber informed Mr. Drummond that 45 per cent of his pack must be turned over to the Government the claimant acquiesced. The penalties for refusal would have been severe. A cancellation of his license to manufacture is suggested by Capt. Ketchum as a probable consequence of a refusal, followed by an actual commandeering.

3. The contract of sale was made on October 28, 1918, when Lieut. Brushaber, after having examined the sample cans, told the claimant's agent "they were all right and to go right ahead." The pur-

chase order of October 30, 1918, was intended to be and is confirmatory of the oral agreement. It provides for the delivery of tomatoes No. 2 "as per samples submitted." The provision, "Goods subject to inspection on arrival," is not in contradiction. It is a familiar case of a sale by sample. An inspection would be for the purpose of determining whether there were "spoils or swells" and if the tomatoes were in condition to be shipped overseas.

4. The claimant having sold his tomatoes "as per sample submitted" was entitled at the least to have them compared with the samples and a decision made which should be based on a comparison between the contents of the sample cans and the contents of the cans that were later examined.

There is no other satisfactory method of determining whether the goods are "up to sample." Six cans had been retained by the Government in October, 1918, as samples, but no use was made of them in the inspection of January and February, 1919.

Mr. Davis, the inspector, testified that he "had nothing to do with the samples at all, the first samples submitted," and made no comparison.

The determination of the grade of canned tomatoes is largely a matter of expert judgment on the part of the examiner, and in this, as in other matters, experts differ widely.

5. It is argued that the first samples taken showed that the tomatoes reached the grade called standard, or that they just "passed," and that they must reach the same mark on the second examination. That argument loses sight of the fact that the tomatoes were sampled first and purchased as a result of the examination by Lieut. Brushaber.

The claimant was not desirous of selling any part of its pack to the Government. On the contrary it earnestly wished to be relieved of that obligation. The Government insisted on a sale of 45 per cent of the tomatoes and made an immediate inspection, and being satisfied that the tomatoes were of suitable quality notified the claimant that they would be taken. Two days later a purchase order was issued.

6. The inspection was made before the decision to purchase was reached. The provision of section 21, paragraph (b) of Bulletin 10 was followed by the depot quartermaster. It reads:

"(b) Canner may elect to submit samples to the depot quartermaster or supply officer to whom the product is to be shipped."

The tomatoes were in warehouses in Baltimore at the time and delivery would consist merely of turning over warehouse receipts. As the cans had to be packed in export cases and strapped with iron or wire delivery could not be made until after packing and strapping.



7. The Government having made its inspection and examination and having taken samples in the customary manner and having decided to purchase the tomatoes and having notified the claimant of its decision can not some months later recall its decision and require the claimant to endure the losses.

The Government stands committed without the right to revoke or to cancel its order. It is not consistent with the agreement for the Government to call for a new examination of the tomatoes after the packing and strapping were finished. The phrase in the purchase order, "Goods subject to inspection on arrival," should not be construed so as to be repugnant to the agreement of the parties. In the first place the goods had "arrived"; that is, they were at waterfront warehouse in Baltimore. They had already been inspected and the Government had determined that they were of a quality suitable to its needs. The provision for inspection in the purchase order was, as has been said, to see if there were any "spoils or swells" and if the cans were properly packed and strapped.

8. There are some inaccuracies in the record. For many months Government officers who had this claim in hand denied that the tomatoes had been examined before the decision to purchase was made. It was later conceded that such an examination had taken place and that the tomatoes had been found satisfactory.

A suggestion was made that Mr. Drummond of the claimant firm himself selected the sample cans and perhaps picked out the best. This is not accurate. Mr. Drummond had gone home to the eastern shore before the selection of the cans was made. That was done by A. K. Gordy, an employee of the Boyle Co., at random, one can from a case from different parts of the pile. There was no evidence that cans most likely to pass were selected. The interest of the claimant and the Boyle Co. was to pick out as samples such cans as would not have been accepted by Lieut. Brushaber. The claimant was as far as possible from wishing to make a sale to the Government and in October, 1918, would have welcomed a rejection.

The specifications appear to provide that a contractor may have, if he desires, the privilege of replacing rejected goods. This claimant was denied that privilege. One of the grounds given for rejection was that some of the cans were poorly filled. The purchase order provides that "slack-filled cans shall be subject to adjustment in price and reclamation." Such a defect is not a valid ground for rejection.

There are two copies of the purchase order in the record. One copy contains in paragraph 10 the provision "goods subject to inspection upon arrival." In the other copy this provision is omitted. The original is missing.



9. A certificate C has been executed by the Claims Board, Office of the Director of Purchase, under date of July 29, 1919.

The provisions of section 23 of Bulletin No. 10, relating to storage, interest, and insurance, are a part of the agreement that was entered into.

The price of  $\$0.09\frac{1}{8}$  per can in the purchase order was stated to be "provisional."

The Government later fixed the price for No. 2 tomatoes at a higher figure. The claimant alleges that the Government price was \$2.56 a case, which is  $\$0.1066\frac{2}{3}$  per can.

The claimant is not entitled to storage and interest after it was notified that the tomatoes had been rejected.

The claimant should receive fair compensation for its expenses in packing and strapping and for restoring the pack to a condition suitable for sale to the civilian trade.

#### DISPOSITION.

This claim with this decision and a document annexed will be sent to the Claims Board, Office of Director of Purchase, for further proceedings pursuant to Supply Circular No. 17 (1919).

Col. Delafield and Mr. Tanner concurring.

JUNE 9, 1920.

**Case No. 2690.**

*In re* **CLAIM OF BERT HISE.**

1. **PRESENTATION OF CLAIM—JURISDICTION.**—Where a claim, under the act of March 2, 1919, is filed subsequent to June 30, 1919, the Secretary of War has no jurisdiction thereof.
2. **CLAIM AND DECISION.**—Claim for \$44.72, under the act of March 2, 1919, for additional price on wool. Held, this Board has no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, for \$44.72, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. On June 12, 1918, Bert Hise delivered to H. P. Roddie & Co., of Brady, Tex., agents of Charles J. Webb & Co., of Philadelphia, Pa., 326 pounds of wool. Claimant alleges that this wool was shipped for Government use in accordance with the terms of the Government regulations for handling the wool clip of 1918, as established by the Wool Division, War Industries Board, May 21, 1918; that under these regulations claimant should have received at least 70 cents per pound in the grease for this lot, whereas he was allowed from 46½ cents to 61 cents per pound in the grease; and that there is due him, by reason of improper grading, the sum of \$44.72.

3. The statement of claim was sworn to before a notary public on May 15, 1920, and was filed with the Board of Contract Adjustment May 19, 1920. This Board immediately communicated with claimant, making a request for information and evidence concerning a presentation of this claim to any department, official, or agent of the Government prior to the presentation made to this Board in May, 1920. Claimant thereupon furnished the Board an affidavit in which he says:

“The presentation of this claim was first made to a governmental department May 18, 1920.

“It was not made before May 18, 1920.”

## DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763; Zenite Metal Co., case No. 2288, Vol. II, these decisions, p. 796.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and this Board is without power or authority to entertain same.

## DISPOSITION.

A final order will issue denying relief to the claimant.  
Col. Delafield and Mr. Eason concurring.

JUNE 9, 1920.

**Case No. 2663.**

*In re* **CLAIM OF CARLISLE COMMISSION CO.**

1. **JURISDICTION—TIME LIMIT FOR FILING CLAIMS.**—A class B claim filed with the Board of Contract Adjustment as an original tribunal on May 1, 1920, is filed too late to be considered under the act of March 2, 1919.
2. **SAME.**—The Board of Contract Adjustment has only jurisdiction in settlement cases arising under formally executed contracts where the contractor and contracting officer have been unable to agree on a settlement thereunder.
3. **CLAIM AND DECISION.**—This claim for \$180,222.43 arises out of formally executed contracts but was presented as a class B claim. Held, that this Board has no jurisdiction.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$180,222.43, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. During the fall of 1917 and all of 1918, claimant was engaged in the selling of hay and forage to the United States Government, and it alleges that due to unpaid cars, shortage, and reduction of weights, freight adjustments, regrading and repricing, and loss through its overhead expense, the Government is obligated to pay it the amount of its claim herein.

**DECISION.**

1. Claimant filed its statement of claim, Form B, with this Board on May 1, 1920, and from the statement of counsel and the claim as filed, together with the record, there appears to be no evidence that the claim was filed prior to June 30, 1919.

2. The act of March 2, 1919, provides that:

“This act shall not authorize payment to be made of any claim not presented before June 30, 1919.”

It would appear, therefore, that this Board has no jurisdiction to consider the claim as a class B claim under the act of March 2, 1919.

3. From an examination of the record it appears that all of the items comprising this claim arise under and by virtue of formally executed contracts, the Government and claimant having entered into formally executed purchase orders under the provisions of section 6853b, Revised Statutes.

4. The claim, having arisen under formally executed contracts, this Board would only have jurisdiction under General Order No. 103, November 6, 1918.

5. Paragraph 9, Supply Circular 111, November 9, 1918, provides:

"Attention is directed to General Order No. 103, November 6, 1918, creating the Board of Contract Adjustment and empowering such board to hear and determine all claims, doubts, and disputes, including all questions of performance and nonperformance which may arise under any contract made by the War Department *in instances in which the contractor and the contracting officer have been unable to agree.*"

6. This Board, therefore, would only have jurisdiction under General Order No. 103 in this case in the nature of an appeal where the contractor and contracting officer have been unable to agree, and it appearing that no action has ever been taken by the local board, and no disagreement ever having arisen between the contracting officer and the contractor, this Board has no jurisdiction.

7. For the foregoing reasons relief, therefore, must at this time be denied without prejudice.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Averill concurring.

JUNE 10, 1920.

**Case No. Sales BCA-5.**

*In re* **CLAIM OF BEAL-BURROWS DRY GOODS CO.**

- 1. JURISDICTION—BREACH OF WARRANTY OF QUALITY—SALES.—**Where the Government advertises for bids on duck of a certain weight, and claimant makes a written bid therefor, which is accepted by the Government by letter, and it develops that the duck is of a lesser weight than that upon which claimant based its bid, the contract is an informal one, as the Quartermaster General has made no regulation under section 6853b, Compiled Statutes, for the sale of surplus property, and the Secretary of War has no authority to adjust a claim under such contract for damages based on a breach of warranty by the Government, said contract not coming within the provisions of the act of March 2, 1919.
- 2. CLAIM AND DECISION.—**Claim for \$1,242 under General Order 103 for difference of value between 10-ounce and 9.4-ounce duck. Held, the Secretary of War has no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim arising under General Order 103 to adjust a dispute under the terms of a contract between the claimant and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold 60,000 yards of duck, olive drab, 29-inch, 10-ounce, 40 by 26, at 34½ cents per yard, a total price of \$20,700. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage.

This claim was set down for a hearing, but the hearing was indefinitely postponed at claimant's request.

**FINDINGS OF FACT.**

1. Under date of October 13, 1919, 257,498½ yards of duck, olive drab, 10-ounce, 29-inch, located in the Philadelphia zone, were declared surplus by the Surplus Property Division.
2. The Surplus Property Division by advertisement, Textile List No. 6, item 326, closing December 1, 1919, requested bids on 217,498½ yards duck, olive drab, 29-inch, 10-ounce, 40 by 26, located at Philadelphia, made by Fred Bennett, S. P. D. No. 10347.
3. Under date of December 16, 1919, a letter of acceptance of bid for surplus property signed by the contracting officer, Surplus

Property Division, was addressed to claimant covering 60,000 yards duck, olive drab, 29-inch, 10-ounce, 40 by 26, at  $34\frac{1}{2}$  cents per yard, total price \$20,700. This letter stated that shipment was to be made within 60 days. Under the same date S. P. Form No. 13 authorized zone supply officer, Philadelphia, to deliver to claimant upon receipt of remittance the goods listed and upon the conditions stated in the letter of acceptance.

4. Claimant wired the zone supply officer, Philadelphia, on February 28, 1920, as follows:

"We bought from the Government sixty thousand yards O. D., twenty-nine inch, ten-ounce duck, which has just been received. We find it only weighs about nine ounces. Will you allow us the relative difference between the nine ounce and the ten ounce duck? Wire answer."

5. Claimant then submitted upon request of zone supply officer, Philadelphia, samples of duck received. Ten tests of these samples were made by A. S. Dunbar, textile inspector, Philadelphia depot, showed the weight to be 9 ounces. Mr. Dunbar made tests of 10 samples taken from the same stock in the Philadelphia depot which showed the weight to be 9.4 ounces.

6. On April 26, 1920, Bert Carpenter, inspector, Quartermaster Corps, of the zone supply office, St. Louis, Mo., visited the claimant at Little Rock and found approximately 10,000 yards of the duck in their warehouses. Claimant states that 30,000 yards had been shipped on February 5, 1920, to the Fulton Bag Co., Dallas, Tex., and 20,000 yards on December 19, 1919, to the Little Rock Tent & Awning Co. Mr. Carpenter took 17 samples at random from the 30,000 yards available at Little Rock and found the samples to be from 8.9 ounces to 10 ounces in weight and the average weight of the 17 samples to be 9.38 ounces.

7. On March 23 the Chief of the Surplus Property Division wrote claimant that he was prepared to recommend to the Claim Adjustment Board a refund of \$1,242 based upon the difference in value between 10-ounce and 9.4-ounce goods. Claimant replied that this adjustment, if allowed, would be satisfactory.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract but has delivered duck averaging in weight 9.38 ounces instead of 10 ounces as advertised and sold to claimant by Surplus Property Division letter of acceptance of bid dated December 16, 1919.

2. Claimant had the privilege of refusing to accept the material or of returning it to the Government and thereupon rescind the



contract entirely. The claimant did not choose to repudiate the contract altogether but accepted the property as satisfying the contract in part and now seeks to recover damages for the defect. Claimant has not and can not now offer to rescind because he disposed of the property and now claims damages for breach of the contract by the Government.

3. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

4. It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919.

5. This Board is, therefore, without authority to grant relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 10, 1920.

Case No. 2158.

*In re* CLAIM OF EASTERN MALLEABLE IRON CO.

1. **NO AGREEMENT WITHIN THE MEANING OF THE ACT OF MARCH 2, 1919.**—Where claimant is engaged in production under Ordnance Department contracts, and being desirous of "gas coal" requests a liaison officer between the Ordnance Department and the Fuel Administration to secure an allotment of coal to claimant, and by mistake "steam coal" is delivered instead of the coal ordered, which steam coal is billed to claimant at a higher price than it could have purchased similar coal in the vicinity of its plant, and claimant pays for the coal at the price at which it is billed, there is no implied agreement on the part of the Government to reimburse claimant for the excess cost of the coal under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim for \$8,924.96 under the act of March 2, 1919, for difference in price of coal. Held, no agreement within the meaning of said act.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$8,924.96, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claimant's three manufacturing plants were engaged 100 per cent on Government contracts and subcontracts, producing castings during the months of August and September, 1918.
3. The process of manufacture required the use by claimant of quantities of *gas coal* in order to obtain the necessary heat in its melting furnaces and *steam coal* was only needed in limited quantities. The claimant's ordinary source of supply was from certain Pennsylvania mines, from which the claimant obtained its *gas coal* at a price delivered of \$6.568 and its *steam coal* at \$6.70 per ton.
4. On account of car shortage and orders of the United States Railroad Administration the Pennsylvania mines were unable to obtain the necessary cars with which to keep claimant company adequately supplied with *gas coal*. There was no shortage in *steam coal*.

5. In August, 1918, claimant appealed to the district ordnance office, Bridgeport, for aid in securing *gas coal* and described the kind of coal desired, and the district ordnance manager referred claimant to Lieut. C. L. Christian, Hartford district office, fuel branch, fuel and forage division.

6. At that time Lieut. Christian's duties were those of a liaison officer in charge of ascertaining the needs for fuel of the various manufacturers engaged on work for the Ordnance Department, and by keeping in close touch with the Fuel Administration securing the allocation of fuel to the plants most in need thereof.

7. Upon receipt of the claimant's appeal for aid, Lieut. Christian took the matter up with the Fuel Administration and ascertained that under the conditions then existing it would be impossible to secure either the necessary priority orders or the necessary cars to assure an adequate supply of *gas coal* from the Pennsylvania mines, but was advised that certain cargoes of West Virginia *gas coal* had been arranged for from Newport News by water to Providence, R. I., and from the latter point would be distributed to the manufacturers most in need of this character of fuel. Lieut. Christian thereupon advised the claimant that if it desired to secure from 2,500 to 3,000 tons of *gas coal* that that amount could be allocated to the claimant's three plants and a car of sample coal was forwarded at the claimant's request to one of its plants; the sample proving satisfactory the claimant requested Lieut. Christian to arrange to secure for claimant 2,500 to 3,000 tons of the same quality of *gas coal*.

8. Lieut. Christian placed the request with the Fuel Administration, who in turn made the necessary allocation, and orders were issued to cover the shipment.

9. It appears from the evidence that the practice at tidewater (Newport News) was to have the various grades and kinds of coal coming to tidewater by rail inspected and unloaded into what were known as pools, said pools being numbered from 1 to 7, and when a ship or barge was to be loaded with a certain kind of coal said ship or barge would be loaded from such of the numbered pools as contained the grade and kind of coal desired.

10. It further appears that the gas coal desired was in a pool No. 7 and that certain high-grade steam coal was in a pool No. 1; that by some error the steamship *Minneapolis* was loaded from pool No. 1 and not from pool No. 7, in consequence of which her cargo consisted of high-grade steam coal and not of gas coal. The steamer was unloaded at Providence, the coal loaded on cars, and distributed and 1,167 $\frac{1}{2}$  ~~$\frac{5}{8}$~~  $\frac{1}{4}$  tons were shipped to the claimant's plants by rail from Providence.

11. Several cars of this *steam coal*, which should have been *gas coal*, were unloaded before the error was discovered. Claimant immediately stopped unloading and called the attention of Lieut. Christian to the fact of the error, advised him that they did not want steam coal and had no use for same and asked to have the coal then on tracks which had not been unloaded and the balance, which was supposed to be en route, sent to some other point where steam coal could be used. Lieut. Christian at once took up the matter with the Fuel Administration and was advised that the Fuel Administration was not responsible for mistakes and that the claimant must unload and accept the coal.

12. At that time the question of the price of the coal was first raised, the claimant having just received invoice for the sample cars which had been sent them some time previous, from which invoice it appeared that the price would be far in excess of the customary price from the Pennsylvania mines. Lieut. Christian advised claimant that he knew nothing about price and that the Fuel Administration had assured him that the coal would be invoiced at the regular established prices and with the authorized and approved carrying charges added thereto, but what these prices would be neither he nor the Fuel Administration was in a position to say.

13. The claimant unloaded and accepted the coal, all of which they were able subsequently to use. Invoices were subsequently received and paid by the claimant, the total of said invoices being \$16,748.59, the price per gross ton being \$14.46 on a part thereof and \$14.15 on the other part. Claimant alleges that it could have obtained the same grade of steam coal from other sources laid down at its plants at \$6.70 per gross ton or a total expense of \$7,823.63 and has filed claim for the difference of \$8,924.96.

14. The claimant later received, through the efforts of the Fuel Administration, some 1,735 tons of *gas coal*, the kind it desired which came from tidewater (Newport News) per steamship *Danneborg*. The price for this coal was far in excess of the price at which claimant had been obtaining its supply of *gas coal* from the Pennsylvania mines and cost the claimant \$15,025.35 more than the same tonnage of coal would have cost from the Pennsylvania mines. The claimant sets this amount up in one of its statements, but at the hearing the claimant states positively that no claim is being made for the *gas coal* received from steamship *Danneborg*, and the claim is, therefore, only for the difference between the price claimant was paying for steam coal and the price claimant was obliged to pay for coal which had been shipped to it as gas coal but which proved to be *steam coal*.

15. While the delivered price charged for the steam coal was very high, yet all the items making up the total charge to claimant were

investigated by the Fuel Administration and were found to be the correct legal charges. It is very apparent that coal could not possibly be shipped from West Virginia mines to tidewater, floated to Providence, R. I., and then reshipped by rail to destination in Connecticut at anything near the price for coal by all-rail routes from Pennsylvania mines.

16. A hearing has been had before this Board, at which hearing the claimant was represented by counsel and by Mr. E. Mannweilet, its secretary, who conducted all the negotiations with Lieut. Christian. Lieut. Christian was also present and testified.

17. The claimant's position as outlined by its counsel at the hearing is as follows:

"An implied contract is one which places the responsibility of loss upon the party who has caused the loss. There is always an implied contract to repay for damages sustained by reason of action. There is always that, and for that reason we believe that while, as I state, while technically there is no contract, express or implied, there are the facts which place the responsibility upon the Government, which amounts to an implied contract. There is an implied contract that the Fuel Administration is going to provide that which is ordered or which they are requested to produce. Here is a fuel board that is set up with the power to allocate coal from one point to another. The minute that that Fuel Administration accepts a request from a party for certain coal of a certain standard, to be delivered to it, it makes at least an implied contract with the party that it is going to deliver that coal, and when it delivers something absolutely different it has broken that contract. The coal was under the jurisdiction of the Government from the time it was taken from the ground until it was started to be used. The Fuel Administration, the Coal Administration, the Railroad Administration, and the Shipping Board all combined were Government agencies."

#### DECISION.

1. It has been held by this Board in numerous cases that in order for relief to be granted under the terms of the act of March 2, 1919, an agreement, express or implied, must be shown; there must be an agreement directly contemplated and resulting in an obligation; there must have been a mutual intent to contract.

2. There is no evidence that at any time the claimant or the Government, acting through Lieut. Christian, Ordnance Department, and the Fuel Administration, contemplated any agreement which could result in legal obligation. The claimant had full knowledge of the fact that Lieut. Christian and the Fuel Administration were rendering a gratuitous service, it knew the Fuel Administration was not selling the coal, was entering into no contractual relations. A mistake was undoubtedly made at some point by someone. The master of

the ship may have made it; H. N. Hartwell & Son, who handled the coal and collected for it, or their agents may have made the error. There is no proof that the mistake was made by the Government agencies.

3. The claimant had a legal right to have rejected the coal and have absolutely refused to take it when it proved not to be the *gas coal* ordered. The waiving of the legal right to reject that which it had not ordered can not constitute a consideration moving to the Government to support an implied agreement obligating the Government to reimburse claimant for any loss sustained.

4. The fact that claimant accepted that which it was under no legal obligations to accept conferred no benefit whatever upon the Government. The coal taken was *steam coal* which was not needed in the production which the Ordnance Department of the Government was desiring to expedite.

5. To discuss the motives which induced claimant to forego its undoubted legal right would be mere speculation. The fact remains that it accepted the coal, used or disposed of the coal, and while its profits were undoubtedly decreased, yet there is no evidence of any actual deficit.

6. For the reasons *supra*, it is the opinion of the Board that no agreement, express or implied, within the purview of the act of March 2, 1919, was entered into between the claimant and the Government.

7. Relief must therefore be denied.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.

JUNE 10, 1920.

**Case No. 2687.**

*In re* **CLAIM OF A. M. RATT0.**

1. **JURISDICTION.**—Neither the Board of Contract Adjustment nor the Secretary of War have power to adjust a claim on an informal agreement under the act of March 2, 1919, where the claim was not presented until May 18, 1920.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$70 on wool. Held, Board without jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim for \$70 arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Claimant alleges that on June 12, 1918, he delivered 275 pounds of high-grade wool to H. P. Roddie & Co., of Brady, Tex., agent of Charles J. Webb & Co., of Philadelphia, Pa.; that this wool was shipped for Government use in accordance with the terms of the Government regulations for handling the wool clip of 1918, as established by the Wool Division, War Industries Board, May 21, 1918; that under these regulations claimant should have received \$220 for the 275 pounds of wool "in the grease," whereas he was allowed only \$150; and that there is due him, by reason of improper grading, the sum of \$70.

3. The Board of Contract Adjustment received the sworn statement of claim May 18, 1920. The Board immediately asked claimant if he had presented the claim to any department, official, or agent of the Government prior to the presentation made to this Board on May 18, 1920, requesting information and evidence as to any such previous presentation. Claimant has forwarded an affidavit in which he states that this claim was first presented to the Government on May 18, 1920.



## DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 10, 1920.

Case No. Sales BCA-10.

*In re* CLAIM OF INTERSTATE GROCER CO.

1. **SALES—BREACH OF INFORMAL CONTRACT—JURISDICTION.**—The Secretary of War has no jurisdiction of a claim for damages for breach of warranty based on an informal contract of sale not within the terms of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim for \$1,114.19 for damages for breach of warranty in the sale of Carolene evaporated milk. Held, this Board had no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim arising under General Order 103 to adjust a dispute under the terms of a contract between the claimant and the commanding officer, Old Hickory Powder Plant of the Ordnance Department, Jacksonville, Tenn., by the terms of which the Government sold an article listed as "Caroline evaporated milk."

A hearing has been held on this claim.

FINDINGS OF FACT.

1. During the month of July, 1919, claimant received a circular advertisement and proposal of the sale of condemned ordnance property, which circular was issued July 11, 1919, from the office of the commanding officer at Old Hickory Powder Plant, Jacksonville, Tenn. Under the regulations governing the sale as set forth in the circular advertisement in paragraph 7 it is provided "all property purchased is required to be moved within 120 days from date of award."

2. Claimant bid on several items listed in this circular, among which was:

Item-----	402
Article: Caroline evaporated milk, No. 1, 48's.	
Quantity-----	739
Unit: Cases.	
Original cost:	
Per unit-----	\$4.85
Total-----	\$3,584.15

Claimant bid \$3,046.53 on the above-quoted article, which was 85 per cent of the cost to the Government, and on date of August 9, 1919.

was informed by letter from commanding officer, Old Hickory Powder Plant, that this lot had been awarded to him. When the goods were received there were 742 cases instead of 739 cases, so the claimant made further payment of \$21.75, making a total payment of \$3,068.28 instead of \$3,046.53.

3. Between the 1st and the 15th of September, 1919, claimant received these goods, and upon examination it was found that the item listed as No. 402 "Caroline evaporated milk" was in fact not evaporated milk, but was labeled "Carolene, a compound of refined nut oils and evaporated skimmed milk."

4. On September 15, 1919, the claimant wrote the commanding officer at Jacksonville, Tenn., calling attention to the fact that the Government had advertised evaporated milk and shipped a milk substitute. On September 29, 1919, claimant received a reply to his letter of the 15th stating that the Government could not entertain its claim, due to the fact that the merchandise was advertised and sold "as is."

5. On October 11, 1919, claimant replied to the Government's letter of September 29 stating that they did not ask a cancellation of the purchase, but contended for the difference between the value of the evaporated No. 1, 48's, and the compound which was shipped; that they bought "Caroline evaporated milk when, as a matter of fact, it isn't (as is)."

6. The claimant's vice president testified that the difference between the value of the milk advertised and that delivered as arrived at from the market quotations at the time of the sale is \$1.50 per case.

7. Claimant's contention is that it bought Carolene evaporated milk "as is" and that it was prepared to accept it in whatsoever condition it might be, but that it did not receive evaporated milk but a compound of refined nut oils and evaporated skimmed milk.

8. Claimant has disposed of all the goods except 250 cases and is now claiming damages of \$1.50 per case by reason of the delivery of an article different from that purchased.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract but has delivered "Carolene, a compound of refined nut oils and evaporated skimmed milk" instead of Caroline evaporated milk as offered and sold the claimant under the circular advertisement dated July 11, 1919.

2. Claimant had the privilege of refusing to accept the goods or of returning them to the Government and thereupon rescind the con-

tract entirely. Claimant did not choose to repudiate the contract altogether, but accepted the goods as satisfying the contract in part and now seeks to recover damages for the loss sustained. Claimant has not and can not now offer to rescind, because it has disposed of the greater portion of the goods and now claims damages for breach by the Government of an informal contract.

3. This contract is for an amount in excess of \$500, and by the regulations governing the sale "all property purchased is required to be removed within 120 days from date of award." From this it is clear that while the alleged contract might have been performed within 60 days it was not compulsory upon the claimant to accept delivery of the goods within 60 days and, therefore, it necessarily follows that it was not such a contract as would come within the exceptions of section 3744, Revised Statutes.

4. It is the opinion of the Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not within the terms of the act of March 2, 1919.

5. This Board is therefore without authority to grant the relief sought by claimant. The claim is accordingly denied.

Col. Delafield and Mr. Tabb concurring.

JUNE 10, 1920.

**Case No. 2686.**

*In re* **CLAIM OF W. T. NIXON.**

1. **PRESENTATION OF CLAIM.**—Where a claim under the act of March 2, 1919, is not presented to any agency of the Government prior to June 30, 1919, the Secretary of War has no jurisdiction thereof, under said act.
2. **CLAIM AND DECISION.**—Claim for \$42, under act of March 2, 1919, for additional price on wool. Held, Secretary of War has no jurisdiction, because the claim was not filed within the time limited by said act.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. Statement of claim, Form B, in the sum of \$42, has been filed by claimant under the provisions of Purchase, Storage, and Traffic Division Supply Circular No. 17, dated March 26, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States, the claim being presented in accordance with the act of March 2, 1919.

2. The Wool Division of the War Industries Board on May 21, 1918, established Government regulations for handling the wool clip of 1918. Claimant alleges that on or about June 12, 1918, he delivered, at Brownwood, Tex., to H. P. Roddie & Co., agents for Charles J. Webb & Co., of Philadelphia, Pa., about 168 pounds of wool from high-grade Shropshire sheep. Claimant states that this wool was furnished for the use of the Government in accordance with the regulations established by the Wool Division of the War Industries Board; that he should have received under these regulations \$134.40 for this wool, but that he was allowed only \$92.40 by reason of improper grading.

3. The statement of claim was received by the Board of Contract Adjustment on May 18, 1920, whereupon claimant was requested to furnish information and evidence concerning a previous presentation of this claim if he had previously presented same to any department, official, or agent of the Government prior to the time that the claim was filed with this Board. Under date of May 26, 1918,

claimant furnished the Board a signed statement in which he shows that the presentation of this claim "was first made to a governmental department May 18, 1920," and that a presentation of the claim was not made prior to that date.

DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes, authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Capt. Powell concurring.

JUNE 10, 1920.

Case No. 2012.

*In re* CLAIM OF CALIFORNIA PRUNE & APRICOT PRODUCERS (INC.).

1. **ORAL AGREEMENT AS TO PRICE—REVISION.**—Where, at a meeting of California prune packers, at which a representative of the committee on supplies of the Council of National Defense and a representative of claimant were present, it was agreed that all California packers would receive the same price for their 1917 pack of prunes and claimant was directed to hold a certain quantity of its pack for the Army, with the understanding that the price would be fixed later and that all California prune packers would receive the same price, and the Quartermaster General confirms the allotment and claimant delivers the prunes to various quartermasters on purchase orders and is paid a tentative price, which is less than the price finally paid another California prune packer, claimant is entitled to an additional allowance sufficient to equalize its price with that paid such other packer.
2. **CLAIM AND DECISION.**—Claim for \$57,171.98 under the act of March 2, 1919 for an additional price on prunes. Held, claimant entitled to recover.

Mr. Henry writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim is for \$57,171.98 under the act of March 2, 1919. It is made up of the following items:

- |  |             |
|--|-------------|
| (a) The difference in price between that paid claimant for prunes and the price of 7½ cents per pound, bulk basis, on approximately 9,787,225 pounds of 1917 prunes----- | \$52,772.77 |
| (b) Interest on drafts unpaid by the Government at the rate of 6 per cent between the time of invoice until date of issuance by the Government -----                     | 3,644.04    |
| (c) Carrying and storage charges actually incurred on prunes withheld by the Government-----   | 755.17      |

2. The claim was first presented prior to February 15, 1919, by claimant mailing separate claims to depot quartermasters at various stations to which it had shipped prunes. Each claim so forwarded was for such proportion of the total claim as the poundage of 1917 prunes respectively delivered by claimant to each of said quartermasters bears to the total poundage of 1917 prunes on which the claim is based. The claims were afterwards considered by the Subsistence Division and by the Federal Trade Commission at the request of the Subsistence Division, to which the quartermasters had referred the



bills long prior to June 30, 1919. The claim afterwards found its way to the War Department Claims Board, which by resolution of the standing committee on September 15, 1919, transmitted the claim to this Board, conferring upon this Board special jurisdiction to hear and determine the matter.

3. Claimant is an incorporated cooperative association of California producers of prunes and apricots, its purpose being to act as a selling agency for its members. When prunes were delivered to it by producers the sum of 4 cents per pound was advanced to the producer.

4. In the latter part of August, 1917, and until October 15, 1917, on which date it was transferred to the Division of Coordination of Purchase of the Food Administration, there existed as a part of the War Industries Board of the Council of National Defense, a committee known as the committee on supplies, of which Mr. E. O. Heyl was the head.

5. On August 31, 1917, Mr. Albert C. Kuhn was appointed an "expert" in the Council of National Defense. Mr. Kuhn's duties as orally explained to him by Mr. Heyl, were to visit various firms who might furnish dried fruit, and to get knowledge of the sizes and conditions, quality, and distribution of the sizes of the packs of the various fruit packers of California, and to see if the packers and growers would accept allocations. As regards price, Mr. Heyl testified that he instructed Mr. Kuhn—

"That our desire was to pay what was considered by unbiased authority a fair and just price. We had in mind that prunes obtained from the same crop would all be paid for, that is equal quality, would be paid for at the same price." (Heyl hearing, pp. 24, 25.)

Mr. Heyl also explained to Mr. Kuhn that it was the intention to treat every one alike.

6. On September 1, after consultation with Mr. Heyl and pursuant to his instructions, Mr. Kuhn sent the following telegram to claimant:

"Kindly hold for Army and Navy until further notice 2,808 tons choice merchantable quality prunes from 1917 crop, of which one-half sizes of 60 to 70, one-half 50 to 60; price to be determined later; most of which to be packed in 50-pound boxes unfaced, but small percentage need for overseas shipments must be packed in 5-pound tins. Specifications later.

"COMMITTEE ON SUPPLIES, COUNCIL NATIONAL DEFENSE."

On the following day claimant replied to this telegram as follows:

"As per your wire September 1 have reserved for Army and Navy 2,808 tons prunes 1917 crop, half 60-70 half 50-60, awaiting specifications.

Claimant confirmed this telegram by letter of the same date.

7. On September 17, 1917, Mr. Kuhn called a meeting of California prune packers to be held at San Francisco, Calif. Claimant and the California Packing Corporation and other prune packers were represented. Various tonnage was underwritten by those present, claimant underwriting 2,000 tons, and the California Packing Corporation underwriting 500 tons. The tonnage so underwritten by claimant was a reduction of 808 tons from the amount stated in Mr. Heyl's telegram of September 1. Mr. Kuhn wired Mr. Heyl giving the amount of each allotment and noting the reduction in claimant's allotment as stated.

At this meeting Mr. Kuhn stated that the prices on prunes would be fixed by the cash and accounting department of the Federal Trade Commission; that the idea was to fix the allotment without commandeering. Mr. Kuhn testified that the 2,000 tons underwritten by claimant was the final figure on claimant's allotment and was intended as a correction of 2,808 tons allotted in the telegram of September 1. (Kuhn hearing, pp. 32, 33.) He also testified that the packers wished to know whether all would receive the same price for their prunes. He advised those present that, "a friendly commandeering was intended." He also stated that the Government would make a fair price as soon as they could get around to it; that he was not prepared to name a price. He further testified that the representatives present agreed to and accepted the various allotments subject to a price being made later by the Government. It was understood that the final price would be fixed at a later date by some one in Washington on behalf of the Government. He also testified, "It was absolutely understood that each and all of them were to receive the same price."

8. On October 9, the committee on supplies telegraphed Mr. Kuhn that at a meeting between the representatives of the Food Administration, Federal Trade Commission and the Army and Navy with the committee on supplies that it was agreed:

"Because reservations and allotments dried fruits were made several weeks ago the basis prices should be packer's cost plus fair profit, and would be as following subject to revisions after investigation now being made by Federal Trade Commission on costs:

"Army and Navy specifications prunes sizes 50 to 60s 8½ cents; 60 to 70s, 8½ cents—all basis 50-pound boxes, differential of 2½ cents on 25-pound tins and 2½ cents on 25-pound tins, and 2½ cents on 5-pound tins over 50-pound boxes."

The above telegram was confirmed by letter of the same date. The price of 8½ cents per pound for 50-60 prunes packed according to Army specifications equal 6½-cent bulk basis, so that the effect of the tentative prices quoted in the above telegram was to fix the bulk basis price at 6½ cents per pound.

9. On December 17, 1917, at a meeting of the then recently formed Food Purchase Board, which had specific authority from the Secretary of War, such tentative prices were made final.

10. Allotments were made in January and February and claimant and other prune packers learning through Mr. Kuhn that they were to be at the same price, viz, 6½ cents bulk basis, filed protests against such prices. The Food Purchase Board referred these protests to the Federal Trade Commission, which found at least as to one packer the price was not sufficient to cover its cost plus the packing and carrying charges and the fixed margin of 4 per cent, and an additional allowance was made to at least one of the packers showing such high cost figures.

11. When claimant learned that at least one of the packers represented at the meeting of September 17, 1917, had received an increased price, it protested the price fixed for its product by billing the various quartermasters as above stated. The commission substantially decided that there should be a different method of computing fair prices between the prices paid cooperative producers' associations and those paid commercial packers who did not produce prunes but bought them of the producers, as it was practically impossible to compute the cost of the prunes to the producers, and that by figuring claimant's cost on the basis of the price of 4 cents which claimant had advanced to the growers, plus its running expenses, packing charges and 4 per cent profit, claimant would not be entitled to as much as the price theretofore fixed and which it had already received for the prunes. Claimant was so advised by the Subsistence Division by letter dated October 30, 1919.

12. On November 9, 1918, the Director of Purchase and Storage wrote the following letter to the zone supply officer, general supply depot, New York City, relative to the claim of the California Packing Corporation for final adjustment as to the price for its 1917 pack of prunes, which it had delivered to the Government:

"1. Based on a report from the Federal Trade Commission and consideration by a conference between representatives of the Army, Navy, Marine Corps, United States Food Administration, and the Federal Trade Commission, final prices have been named on prunes furnished by the California Packing Corp. as follows:

	Per pound.
ADF-51A, Jan. 9, 1918, 500,000 pounds 50/60, 50-pound boxes prunes----	\$0. 0936
ADF-51A, Jan. 11, 1918, 110,000 pounds 50/60, 50-pound boxes prunes----	. 0936
ADF-51G, Jan. 11, 1918, 100,000 pounds 60/70, 50-pound boxes prunes---	. 0884
ADF-173B, Mar. 26, 1918, 500,000 pounds 60/70, 50-pound boxes prunes--	. 0884
ADF-173G, Mar. 26, 1918, 600,000 pounds 70/80, 50-pound boxes prunes--	. 0832

"2. To the above prices shall be added one-tenth of 1 cent per pound per month for carrying charges from January 1, 1918, to date of shipment; interest at the rate of 6 per cent per annum from date of shipment to date of issuance of voucher; plus the usual strapping

allowance on dried fruits, which is 6 cents per box for  $\frac{1}{2}$ -inch flat iron strapping, well nailed; 4 cents per box for 13-gauge wire strapping, tied with Gerrard wire-tying machine; 4 cents per box for  $\frac{1}{2}$ -inch metal straps, fastened by Signode fastener, or equivalent.

"3. You are instructed to make settlement on the above basis as promptly as possible."

The California Packing Corporation received settlement on the above basis.

13. The procedure after allotments by the Food Purchase Board was for it to notify the Quartermaster General of the allotment to the Army; the Quartermaster General would confirm the allotment by letter to the claimant, advising it to hold the prunes for shipping instructions from depot quartermasters. The quartermasters would then issue purchase orders for the prunes and shipments would be made as therein directed. Some of the purchase orders stated the price for the prunes and some stated that the price was to be fixed later.

#### DECISION.

1. Claimant delivered the prunes to the Government, which accepted and paid for them at the price fixed by the Federal Trade Commission. If claimant is entitled to recover it must be upon the theory that Mr. Kuhn agreed with claimant and other packers represented at the meeting at San Francisco on September 17 that all California prune packers would receive the same price for their 1917 pack of prunes, and that some other California packer, or packers, received a higher price than did claimant for their 1917 prunes.

2. There is no evidence in the record disputing the testimony of Mr. Kuhn that he did agree that all of the California packers would receive the same price for their 1917 prunes. It is established by the evidence that at least one of the packers, the California Packing Corporation, did receive a higher price for its prunes than did claimant. The only reason appearing in the record for this difference in price is that the California Packing Corporation is a commercial packing concern, which buys prunes in the open market, and that its actual cost of the prunes is fixed by the price paid the producers therefor, while claimant, being a cooperative concern engaged as a selling agent in disposing of prunes produced by its members has no cost price which may be considered in fixing the price of the prunes upon a cost-plus basis. In determining what is a fair price to a producer, if the cost of production can be ascertained, it would, of course, be an element in determining what the fair price should be, but when the selling price is fixed by the agreement of

sale and the goods have been delivered the actual cost to the producer can neither have the effect of increasing or reducing that price. So, in this case, the price was not only to be a fair one, but it was fixed in a sense, since it was to be the same price that other packers were to receive. This was a very material part of the agreement, under which claimant agreed to furnish the prunes. It is a cooperative association organized for the purpose of obtaining for its members the profit, less its selling expense of the "middleman," so to speak. If it chose to do so it could no doubt undersell the commercial packer, but if it chose to exact from the Government an agreement that it would receive the same price as the commercial packer there is no good reason why it is not entitled to receive it, and the boards and Government officers who have heretofore had to do with this claim seem to have considered this claim on the fair-price theory rather than on the theory of a price fixed, i. e., the price to be paid to all California packers.

Claimant held the prunes pursuant to the telegram from Mr. Heyl, the amount specified therein being reduced later by oral understanding with Mr. Kuhn. The allotment to the War Department was confirmed by the Quartermaster General. Orders were therefore placed by various quartermasters, in some of which the price per pound was stated, and in some of which it was stated that the price would be fixed later. It must be held that where prices were stated they were tentative merely and were subject to the previous understanding between claimant and Mr. Kuhn and therefore subject to revision. Such has been the construction placed upon claimant's orders as well as those given the California Packing Corporation. The action of the Director of Purchase and Storage and of the Food Purchase Board in considering claimant's protest is additional proof of the understanding upon which claimant relies.

3. While there is no evidence of an express agreement as to the payment of storage on the prunes, it does appear that on December 22, 1917, Mr. Heyl asked Mr. Kuhn if the packers would not hold their prunes for shipping instructions with the agreement to pay storage, and in advising the Quartermaster General of the allotment Mr. Heyl stated that the claimant had facilities for storing the prunes and suggested that shipping directions be given only as the prunes were needed. Having held the prunes for the Government, there is an implied agreement that it would be reimbursed for reasonable storage or carrying charges. This item was allowed the California Packing Corporation. In order that the Government's agreement may be kept, claimant should receive the same price as other California packers. Claimant is entitled to an award of the following items: (a) The difference between the price claimant re-

ceived for its 1917 prunes and that paid the California Packing Corporation; (b) one-tenth of 1 per cent per pound per month as carrying charges from January 1, 1918, to date of shipment; (c) the usual strapping allowance according to the schedule used in paying the California Packing Corporation, or if the claimant has been paid a strapping allowance, the difference between such rates and what claimant has received. Interest can not be allowed.

**DISPOSITION.**

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and a certificate, C, to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular 17, Purchase, Storage and Traffic Division, 1919.

Col. Delafield concurring.



JUNE 10, 1920.

**No. 2501.**

*In re* **CLAIM OF PHILADELPHIA BOILER WORKS (UNDER FOUNDATION CO.).**

- 1. SUBCONTRACTOR—NO CLAIM.**—Where the proof shows that a subcontractor could have canceled its orders for material without loss, but retained it and used it in its private business, it had no claim for reimbursement for loss, if any, on suspension or cancellation of its contract with the prime contractor.
- 2. CLAIM AND DECISION.**—Claim under General Order 103 for \$614.75 commitments. Held, claimant not entitled to recover.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal by a subcontractor, brought in the name of the prime contractor, the Foundation Co., from the decision of the Board of Contract Revision and Claims Board, Construction Division, under circumstances which hereinafter appear.

2. Under date of February 21, 1918, the Foundation Co. entered into a contract with the Government to construct a plant for assembly of propellant charges near Tullytown, Pa.

3. On August 21, 1918, the Foundation Co. sent an order to the claimant in connection with said contract, to furnish, deliver, and erect—

“Steel smoked breeching, as per our drawing No. N-1574-L 15. Measurements to be verified by you. Same to be erected within five to six weeks from the delivery of first steel. The Foundation Co. to make immediate application for priority. Price, \$6,825.”

4. Within a day or two thereafter it was discovered that the steel smoked breeching could be obtained more quickly from another concern, and on August 27, 1918, the Foundation Co. notified the claimant by letter of that date that they canceled the order of August 21, 1918, for the reason that there was urgent necessity for getting heat into the buildings, that the breeching was therefore necessary at the earliest possible date, and that as the claimant did not have the material in stock on hand it was thought advisable to get the breeching elsewhere. The claimant alleges that it had already given the neces-



sary order for steel for the breeching, and files this claim for expenses in connection therewith, itemized as follows:

To cancellation of order after material had been placed with mill at price of stock plates, namely, 1 cent per pound over mill price-----	\$269. 75
Hauling, handling, and waste-----	270. 00
5 trips to Tullytown getting order, checking up dimensions, etc-----	75. 00
Total-----	614. 75

5. The Board of Contract Review and Claims Board allowed the third item of \$75 and disallowed the other two items, and from their decision this appeal is taken.

6. A hearing was had in this case in which the claimant was notified to appear. The claimant, under date of June 7, 1920, wrote that it did not care to furnish evidence other than appeared from the files.

7. Maj. C. M. Foster, Quartermaster Corps, called as a witness for the Government, testified that at the time of the cancellation of the claimant's order steel of all kinds was very much in demand, and that the claimant's order to the mill could undoubtedly have been canceled without expense to the claimant, upon receipt of notice from the claimant that its order from the Foundation Co. was canceled.

8. Under date of October 10, 1919, the claimant wrote to Brig. Gen. R. C. Marshall, in connection with this claim, the following letter:

PHILADELPHIA, PA., *October 10, 1919.*

R. C. MARSHALL, JR.,  
*Brigadier General, Construction Division of the Army,  
 War Department, Washington, D. C.*

(Attention of Maj. C. M. Foster, Quartermaster Corps.)

GENTLEMEN: Acknowledging receipt of your letter of October 2 regarding claim No. 412.32 CR-MT (Tullytown bag-loading plant), we would advise as follows:

The material for this breeching was placed with the Nagle Steel Co. at Pottstown, Pa. Referring to cancellation with the mill, we did not deem it advisable to cancel this material inasmuch as the writer made a personal visit and after considerable discussion we were given a very good shipping date, so that to cancel the order within two or three days thereafter did not seem to be good business at that time. Had we done this, we feel sure that any other orders that we might have had would have been held up indefinitely, bearing in mind that the war was still on and material very much sought after.

Referring to paragraph C, all the material was rolled and shipped from the mill.

Paragraph D: The work done by this company consisted of getting out sketches and making up a material list, the writer taking same to the mill, making a personal visit regarding delivery.

After the plates were received they, of course, were not in sizes that could be handled without cutting. We were, therefore, compelled to handle and shear same to take care of the individual jobs in

hand. The material in question was used on six or seven different jobs which came in afterwards and for which we could have bought the material at the prevailing price at that time, which was much lower than the price paid for these plates. In fact, we still have a few sheets of this plate on hand, which, on account of the extreme narrow widths, we have been unable to work in on any other job to advantage.

We trust that after going over the above you will see the justice of our claim and that same will be passed to our credit.

Yours, very truly,

PHILADELPHIA BOILER WORKS,  
WM. HUNTER, *Treasurer*.

#### DECISION.

1. The claimant received a valid order as subcontractor for the steel smoked breeching, as it claims.

2. Upon receipt of the cancellation of this order it was the duty of the claimant to minimize, so far as possible, its damages in connection therewith. We find from the testimony of Maj. Foster, and from the letter of the claimant, dated October 10, 1919, that the claimant might have canceled its commitment which it made on the order from the Foundation Co. without cost to the claimant.

3. The reason that the commitment for which the claimant now seeks reimbursement was not canceled is apparent from its letter just referred to, in which the claimant states:

"We did not deem it advisable to cancel this material inasmuch as the writer made a personal visit, and after considerable discussion we were given a very good shipping date, so that to cancel the order within two or three days thereafter did not seem to be good business at that time. Had we done this, we feel sure that any other orders that we might have had would have been held up indefinitely, bearing in mind that the war was still on and material very much sought after."

In other words, the claimant chose to accept the steel which it had ordered, for the purpose of fulfilling other Government orders, or private orders of the claimant. In doing so it must be taken to have assumed any loss which might follow.

4. We do not find the claimant entitled to any more than has been allowed it by the Board of Contract Review and Claims Board.

#### DISPOSITION.

The claimant's appeal is dismissed, and a copy of this decision will be sent to the Board of Contract Review and Claims Board.

Col. Delafield and Mr. Tanner concurring.

JUNE 10, 1920.

**Case No. 1932.**

*In re* **CLAIM OF THE J. G. WHITE ENGINEERING CORPORATION.**

1. **PAY-ROLL DEDUCTIONS.**—The contractor, under a cost-plus contract, must present properly signed receipts, or other undoubted evidence as to the correctness of its pay-roll accounts, and where proper proof is not presented, due to claimant's inefficient accounting system, such items will be disallowed.
2. **TRADE DISCOUNTS.**—Under a cost-plus contract it was the duty of the contractor to take advantage of trade discounts, and this applies to plant equipment subsequently purchased by the Government at cost, as well as ordinary supplies.
3. **TRANSPORTATION CLAIMS.**—Claims for shortages or breakage while in transit to the site of the work are claims against the carriers and are not allowable under the contract.
4. **MISCELLANEOUS CLAIMS.**—A number of claims disallowed because not pertaining to work or supplies under the contract, or not supported by sufficient evidence; others allowed as proper.
5. **CLAIM AND DECISION.**—Claim under General Order 103 on formal cost-plus contract for \$30,562.19. Held, claimant entitled to recover on some items, other dismissed.

Mr. Williams writing the opinion of the Board.

**FINDING OF FACTS.**

The Board finds the following to be the facts:

This case arises under General Order 103, War Department, 1918, and comes to this Board as an appeal from the Air Service Claims Board disallowing items aggregating the sum of \$30,562.19 alleged to have been expenditures made by the petitioner in performing work under a cost-plus contract in the construction of an aeronautical experiment station at Langley field in the vicinity of Hampton, Va., for which disbursements, it is alleged, reimbursement should be made by the Government under the terms of the contract for the work. The facts and circumstances of the case are as follows:

1. Under date of June 20, 1917, the J. G. White Corporation entered into a validly executed contract with the United States (by Lieut. Col. C. G. Edgar, Signal Corps, contracting officer) by which the petitioner undertook to do all things necessary for the construction and completion of the following work:

“The construction of an aeronautical experiment station at Langley field near Hampton, Va., in accordance with the plans and specifications of Albert Kahn of Detroit, Mich.”

This construction work was to be done upon what is commonly called a cost-plus basis, and the contract for the work contained the following stipulations with respect to the reimbursement to be made by the Government to the petitioner for expenditures made in the progress of the work:

“ARTICLE II.

*“Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

“(a) All labor, material, machinery, hand tools not owned by the workmen, supplies, and equipment necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done without the prior consent and approval of the contracting officer.

“(b) All subcontracts made in accordance with the provisions of this agreement.

“(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clamshell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers’ levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

“Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof no further rental therefor shall be paid to the contractor, and title thereto shall vest in the United States. At the completion of the work the contracting officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

“Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rentals charged in the particular territory in which the work covered by

this contract is to be performed. If the contracting officer shall furnish or supply any such equipment the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

“(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work, subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

“(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor, and expediting the production and transportation of material and equipment.

“(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work, but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

“(g) Buildings and equipment required for necessary field offices, commissary and hospital, and the cost of maintaining and operating said offices, commissary and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

“(h) Such bonds, fire liability and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

“(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

“(j) Such proportion of the transportation, traveling and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

“(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph.

“The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds, and machinery, furnished under this contract, and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for



such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools, and supplies of every character, shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant and tools over distances in excess of 500 miles shall require the special approval of the contracting officer.

"No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above, shall be included in the cost of the work.

"The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

"All revenue from the operations of the commissary, hospital, or other facilities or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work."

#### "ARTICLE IV.

*"Payments.*—On or about the 7th day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to  $3\frac{1}{2}$  per cent, except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed items or item shall govern. The contracting officer shall then transmit to a Signal Corps disbursing officer a copy of said statement, together with original pay rolls, invoices, and other necessary papers relating thereto, and said disbursing officer shall, as soon as may be practicable, pay to the contractor the cost of the work mentioned in (1) and the fee mentioned in (3) of such statements, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding  $3\frac{1}{2}$  per cent, as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals for the purpose

of enabling the contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work and the execution by the contractor of a release forever discharging the United States of and from all manner of debts, claims, and demands whatsoever arising under or by virtue of this contract, the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof."

"ARTICLE XIV.

"*Settlement of disputes.*—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the Chief Signal Officer for determination. If, however, the contractor shall feel aggrieved by the decision of the Chief Signal Officer, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto."

2. From an examination of the above quoted terms of the contract, it will be observed that the Government was standing the entire expense of this work, but that the petitioner was required to make payments for labor and materials, etc., and where such expenditures were properly made in accordance with the terms of the contract, and evidence of the kind agreed upon was submitted, it was the duty of the Government to make reimbursement for such expenditures to the petitioner. The work at Langley field was begun in due time and disbursements were made by the petitioner for all labor and materials and other costs and were properly reimbursed to the petitioner by the Government, except the items making up this claim, which were disallowed by the Government auditors on the job, the action of the auditors being approved by the Claims Board, Air Service; and as a result of such action on the part of the Air Service Claims Board this case was brought before this Board for determination. The facts in connection with each one of the items, or groups of items, disallowed will be discussed in connection therewith in the decision.

DECISION.

1. Group No. 1: Pay-roll deductions, \$6,649.42.

(a) Workmen's signatures to receipts not properly signed, in that signatures by mark were not witnessed, or the workmen signed by initials instead of full name, \$137.82. It was not unreasonable that the Government agents should require the petitioner to exhibit a



properly signed receipt showing the disbursement of money to workmen. In the absence of a properly witnessed receipt there was no way by which the Government agents could tell whether such money had been expended or not. The rules in respect to this matter were reasonable, and the Government is not liable to reimburse petitioner for any money expended where proper receipts were not furnished, unless it was possible for the petitioner to have shown beyond any peradventure by other and clear evidence that such money was expended. There has been no such proof in this case and this item must be withheld. The contention that the Government agents were in any way responsible for the failure of the petitioner to secure the proper receipts is without merit, as the efforts put forth by the Government agents in respect to the matter of payments of the pay rolls were for the purpose of assisting the petitioner and at the same time securing the Government, but this voluntary assistance did not in any sense relieve the petitioner from the responsibility of securing proper receipts for expenditures made.

(b) Receipts lost, \$75.60. The evidence before this Board was not sufficient to show that any of these so-called lost receipts were turned over to the Government agents before they were lost. In the absence of the receipts there was no convincing evidence submitted to the Government auditors that the disbursements had been made, and the same were properly disallowed, and for the same reason must be disallowed by this Board.

(c) Receipts not accurately showing the amounts actually paid, \$13.30. In the absence of proper receipts sufficient evidence of the excess over and above that stated upon receipts was not furnished the Government auditors, and has not been furnished this Board and must be disallowed.

(d) Pay rolls showing time in excess of that shown on foreman's report, \$3,333.14. From the beginning of the work in June, 1917, the petitioner used the system of brass checks for keeping the time of the men, and in addition to this, largely for the purpose of ascertaining the separate costs of the various permanent buildings that were under construction at Langley field, kept a foreman's report upon each building. From the very beginning it seems the Government auditors in checking over petitioner's pay rolls for the purpose of passage and approval compared the pay rolls made up by the timekeepers with the foreman's report, and where there were discrepancies between these two systems of keeping the time the foreman's report was relied upon as being the more accurate, and petitioner was called on to submit evidence, where there were discrepancies between the foreman's report and the timekeeper's report, to show that more had been earned by any man than that shown upon the foreman's report, and in many matters of dispute

thus arising adjustments were made, where it could be shown by the petitioner that a man had actually earned more money than was shown on the foreman's report.

This system was continued until about the middle of December, 1917, when petitioner received notice that from then on the Government would rely upon the foreman's report as the best means of accurately ascertaining the amount of time that each man was entitled to. The items that go to make up the amount here asked for are discrepancies that occurred, for the most part, during the months of November and December, 1917, between the time alleged to have been earned as shown by the timekeeper's report, and upon which petitioner alleges that payments were made, and the time earned by the man as shown on the foreman's report, by which the Government auditors settled, in the absence of other convincing evidence that the foreman's report should be corrected. It is impossible for this Board, in the present state of the evidence, to say that any error was committed by the Government auditors in the finding of fact in regard to the amount of time that each man earned. The situation in respect to that matter is not without difficulty. The question ultimately to be decided is how much time did each man earn for which he was entitled to receive payment from the White Co., and, therefore, how much money is the White Co. entitled to receive from the Government. The circumstances as they then appeared developed the necessity of ascertaining, from the best available evidence, how much money had actually been earned by the men who were employed on the job. The auditors undertook this difficult problem and solved it by allowing the amount which the best evidence showed was due. This Board has not been furnished with any evidence of such clear and explicit nature as would enable it to find that more was earned than for which reimbursement has been made by the Government. As a matter of fact, the auditors regarded the foreman's report as more accurate than the timekeeper's report, and the evidence submitted as to the method by which these various agents operated indicates very clearly that the account of the time earned by the men should have been, and very likely was, more accurately kept by the foreman, who worked directly over the men, than by any central time office which depended, for the most part, upon the taking out and turning in by the men themselves of the brass checks that were issued.

(e) Errors in calculations, \$130.31. The Government is not liable for errors in calculation, by which petitioner made excessive payments.

(f) Employment of persons not approved by Government field officers, \$689.34. This item embraces amounts paid to men who were not upon the pay roll, or amounts paid in lieu of notice to quit, men

employed without the approval of the Government officer, unauthorized increases allowed, etc. All of these items received the consideration of the auditor at the field, and were disallowed either because proof of their employment was not furnished in the method required or their employment was not authorized. There has been no evidence furnished to this Board which would justify a reversal of the finding of the auditor, and this item be disallowed.

(g) Various minor items, such as meals and lodging obtained by workmen after their employment ceased, cost of badges and checks lost by workmen, transportation advanced to workmen but not deducted from their wages, value of property destroyed, and value of tools lost by workmen, \$62.42. There is no evidence upon which any of the items that go to make up this claim can be allowed.

2. Group No. 2: Discount deductions, \$10,738.26. A clause in Article II of the contract between the Government of the United States and the petitioner with respect to the construction work at Langley field provides as follows:

"The contractor shall take advantage, to the extent of its ability, of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor."

Under this clause in the contract, as has heretofore been said by this Board in case No. 1882, by this petitioner, decided April 9, 1920, speaking with reference to discount deductions and referring particularly to the above-quoted provision of a similar contract:

"Under this clause of the contract it was clearly the duty of petitioner to use every reasonable and ordinary means to secure all available discounts upon bills for material whether those discounts appeared upon the face of the bill or not. In cases where the discount did not appear upon the face of the bill whether the discount was available or not depended upon whether or not it might have been secured if it had been seasonably asked for."

The above quoted principles apply with equal force to this case. The petitioner, however, in this case attempts to draw a line of distinction with respect to the liability of the petitioner under the terms of the contract between discounts upon supplies and equipment used in the ordinary course of the work and discounts upon plant material which was bought for the account of the contractor and later, after the Government had rented it for some time, sold to the Government, the petitioner claiming that in the latter case there was no duty resting upon the petitioner to take advantage of any available discounts. We are of the opinion that no such distinction should be drawn. Whenever the petitioner purchased any plant materials which were to be rented to the Government it was well understood that the Government, after the accrual of a certain amount of rental,

might exercise the right to purchase the material. It was the duty of the petitioner at the time that such equipment arrived upon the site of the work to state its value to the contracting officer, and this value, unless modified by the contracting officer, was the price at which the Government made payment to petitioner for the plant equipment when the Government exercised the option to purchase. With respect to the purchase of any equipment it is out of the question to assume that the petitioner understood that it had a right to make a profit upon the purchase and sale of this equipment to the Government. Moreover, in the circumstances of the case, the situation and fair dealing between the parties placed the duty upon the petitioner to secure such plant equipment at the cheapest price and upon the best terms possible, and this, in the judgment of this Board, necessitated the taking advantage of all available discounts for the benefit of the Government, who was to become, or might become under its option, the owner of the property. It should also be said in connection with all these matters of discount that those embraced in the claim here presented constitute but the residue of a large number of such items, and that many of such items were handled and adjusted with the auditor on the job, and all allowances consistent with the obligations of the contract were paid to the petitioner. Nor can it be said that the petitioner was ever taken by surprise in respect to the matter of discounts, because there were many conferences dealing with the subject between the petitioner and the Government officers, and full and explicit instructions were issued which left no room for doubt as to the duty of the petitioner in dealing with the matter of discounts.

3. Group No. 3: Transportation claims, \$1,961.15. This item embraces for the most part deductions made by the auditors from invoices for supplies and material at the site of the work because of breakages in transit and shortages. The theory upon which the petitioner seeks to recover these shortages against the Government is that, at least so far as the railroad companies are concerned, petitioner was required to receive all supplies and materials f. o. b. points of shipment, and that the Government itself paid the freight, and that the Government in accomplishing the payment of freight by executing the receipt for the material in apparent good order placed it beyond the reach of the petitioner to make claim for breakages and shortages against the carriers who transported the material to the site of the work. This Board went into this matter in great detail at the hearing, discussing fully every phase of the situation, including the method of the accomplishment of the payment of freight as related not only to the different characters of shipment, but also as to the nature of the claim in each instance. It is the opinion of this Board that the method used by the Government in

accomplishment of the payment of the freight upon shipments did not preclude the petitioner from making proper claims against the shippers or the carriers for shortages or for damages in transit or otherwise. One particular item coming under this classification should be discussed particularly. This was a shipment of glass from Benswanger & Co., at Richmond, Va., to the site of the work. The glass reached Langley field in a damaged condition. No payment appears ever to have been made to the petitioner for the invoice covering this shipment of glass, and a great deal of the glass, either that which was to some extent damaged or that which was not damaged, was left upon the premises and used by the Government. It is impossible now to tell how much of that glass was used by the Government, although the evidence tends to show that all that was usable was so used on the job. There has been filed an affidavit by Mr. John L. Bordman which shows that the salvage value of this broken glass was \$554.50. We are of the opinion that the Government is liable to the petitioner for the glass, as the evidence is sufficient to show that that amount of glass was used by the Government at the site of the work, and this amount should be reimbursed under the terms of the contract. This liability, however, is in no way based upon the notion that the Government is liable because it interfered in any way with the petitioner in the presentation of a claim for damage to the glass against the railroad company or the shipper, but is based upon the fact that the Government used the glass. It is pertinent to remark also that as the hearing developed a number of items coming under the general head here discussed were withdrawn by the petitioner with a view to their collection from the carriers involved by the Traffic Division of the Air Service, the Traffic Division merely rendering assistance to the petitioner in respect to these claims.

4. Group No. 4: Expense accounts, \$1,104.01. This claim embraces first of all the amount of \$226.91 incurred by petitioner's traffic men and disallowed by the Government field auditor for the reason that their expenses averaged more than \$4 per day. These items of expense can not be allowed. The rule that no expense account should exceed \$4 a day was a reasonable one with which the petitioner company was thoroughly familiar and by which it was governed.

Voucher No. 733, deductions from expense account of J. T. McClellan, partial payment No. 21, subvoucher 18, which covered the expenses of Mr. Dunn and Mr. Crane to Detroit in May, 1917, must be disallowed, upon the ground that this must be considered a part of the general office overhead in view of the fact that expenses in connection with this trip have been borne by the Government to the extent that such expenses might be applied to the work in question.



The expense account of Dunn and Crane, which was carried on the account of J. T. McClellan, also included the expense account of Paul Reber amounting to \$132.69. We think that the expense account of Paul Reber, upon the presentation of the proper vouchers, should be allowed, as it was in connection with bringing bridge carpenters to the site of the work in connection with the construction of a bridge across Back Bay.

The expense account of R. B. Skinner of \$162.61 was withdrawn from this claim to be considered in claim No. 2452 before this Board as being in connection with the closing up of the work in connection with Langley field.

The expense item of W. L. McClelland from Charlotte, N. C., to the site of the work, voucher No. 5501, for \$28.37, should be allowed as this man came from Charlotte, N. C., to the site of the work in direct response to instructions and authority from Lieut. Saville, who was the engineer in charge of the Government work at the time, and should be paid upon the presentation of the proper vouchers.

Voucher No. 4785, deductions from the expense account of John Clinton of \$13.81 should, in the opinion of this Board, be allowed. It appears that John Clinton was employed by the petitioner company from New York to work at Langley field at a certain scale of wages then prevailing, but while he was en route the scale of wages was changed by the Government, and after Clinton had worked one week he declined to continue to work at the changed schedule of rates, and \$13.81 covers the amount of his transportation back to New York. We think it is an item that was a proper charge under the circumstances, and should be paid.

The items of \$6.94 on the expense account of W. H. Goodale can not be allowed because it represents an amount of expense over and above the allowance of \$4 per day.

Voucher No. 5601, deductions from partial payment No. 358 in the amount of \$403.58 covering the expense account of George Hines, jr., appears to have received the approval of the officer in charge of the work and failure to pay it was due to the fact that proper vouchers were not submitted covering this expenditure. It must be left to the Claims Board, Air Service to settle this amount upon the proper presentation of vouchers. The evidence shows beyond all question that Capt. McInerney, who was Government superintendent, instructed this man Hines over the telephone to canvass the Italian district in New York and secure men and to incur certain expenses in the publication of hand bills in Italian. It must, however, be left to the petitioner company to submit proper vouchers covering expenditures in connection with this item of expense.

5. Miscellaneous deductions, \$3,907.24. (a) From time to time at the hearing of this case as the evidence developed it became the

belief of the auditor for the air service present that sufficient documentary evidence had been submitted to justify the auditor for the Air Service in paying the following deductions, and they were withdrawn without prejudice by the petitioner from the consideration of this Board for that purpose:

Voucher  
No.

7999. C. Billup Sons Co.....	\$11. 76
7703. Chesapeake and Ohio R. R. Co.....	50. 96
3391. Wm. B. Andrews Co.....	10. 63
5909. Norfolk Stationery Co.....L.....	25. 20
4556. Western Electric Co.....	24. 00
5945. T. T. Keane Co.....	100. 00
292. E. I. Du Pont de Nemours.....	421. 68
2346. Old Dominion Steamship Co.....	16. 52
3775. Standard Underground Cable Co.....	14. 00
5357. Maloney Electric Co.....	54. 00
7962. Bellamy Pharmacy.....	27. 00
4625. Noland Clifford Co.....	9. 92

(b) It appears that there were a great many items of apparent shortage in materials and supplies on account of which deductions were made by the auditors. Early in 1919 Lieut. Col. Gallagher sent Capt. McInerney (who was the Government officer in charge of all construction during the progress of the work) to the field for the purpose of going into the matter of these shortages and securing all available evidence as to whether or not and to what extent such apparent shortages were not shortages and to what extent such supposed material had actually been received and used on the job, and Capt. McInerney, together with certain other Government officers and officers of petitioner company, went into great detail for the purpose of ascertaining these facts. At that time Capt. McInerney and the officers under him considered a great number of these matters, declining many, but becoming satisfied from the evidence produced that certain apparent shortages were not shortages, and in respect to these matters showed, in his judgment, the validity of petitioner's claims with reference to the amounts of deductions set out as follows:

Voucher  
No.

5947. West Disinfecting Co.....	\$58. 50
6972. John Simmons.....	7. 25
1086. Fibre Conduit Co.....	17. 55
6680. Virginia-Portland Cement Co.....	12. 60
3306. Western Electric Co.....	33. 00
7037. Seaboard Supply Co.....	12. 57
7113. Robinson Clay Products Co.....	8. 40
4799. R. D. Wood Iron Works.....	256. 90
4016. Robinson Clay Products Co.....	63. 18
7811. Reid Murdoch & Co.....	14. 00
7657. National Electric Supply Co.....	14. 85
6748. Winn Bros. & Baker.....	3. 50
6415. Norfolk Stationery Co.....	12. 00
Tower Binford Electric Co.....	24. 45
4858. Standard Scale & Supply Co.....	225. 00
6717. L. Born & Son.....	35. 50
2628. Max Schwan.....	1. 38



Voucher  
No.

2729. John D. Westbrook (Inc.)	\$390. 00
3349. Rosenbaum Hardware Co.	2. 59
7375. Scott Butter Co.	16.05
4445. Virginia-Carolina Supply Co.	1. 81
6672. C. W. Antrim & Co.	37. 28
4069. Robinson Clay Products Co.	10. 80
7360. Lyon Conklin & Co.	12. 22
3051. Armour & Co.	16. 50
3035. Myers Bros.	3. 60
1052. John D. Westbrook (Inc.)	24. 70
3544. Standard Supply & Equipment Co.	34. 00
6064. Southern Electric Co.	84. 25
6510. Benswanger & Co.	163. 00

It seems that in respect to these items which had been approved by Capt. McInerney, or any officer under him, upon the investigation instituted by Col. Gallagher and a survey of the material upon the field such as took place in this case, the evidence of the receipt and use upon the job of the supplies mentioned, and for which payment is asked, is sufficient to justify the passage of these items for payment, and where such approval appears and the item is supported by the necessary papers that the same should be passed for payment by the auditors. It was a difficult situation which called for the securing of the best possible available evidence, and that evidence was secured and seems sufficient to justify payment.

(c) 1. First-Kerber Cut Stone Co., \$165. The Government admits an error of \$100, so that upon the submission of proper vouchers this \$100 can be allowed without further controversy, and the only remaining question is as to the \$65 claimed. It appears that there was a shipment of stone by freight, but on account of certain breakage it was necessary to secure a replaced shipment by expressage, and this expressage cost \$75. Ten dollars of this express charge was paid by the railroad company upon the theory that it would cost that amount to replace the broken shipment by freight. This Board is of the opinion that the Government should pay the \$65 expressage upon the theory that there was an urgent need for the stuff and that it was in the interest of the Government that it should be secured as soon as possible, and it is the opinion of this Board that the amount of \$65 should be paid upon the presentation of proper vouchers. This express shipment was authorized by the Government officers. It is very apparent that the Government is not liable for the item of \$45 for any breakage in transit.

2. Empire Machinery & Supply Corporation, \$144.44. This item is for various shipments of machinery supplies which were secured for the most part by petitioner upon its trucks at Hampton. The material received reports were not initialed by any Government checker and the bills were not reimbursed by the Government because the evidence required, showing that the stuff was received, was not furnished. No additional evidence has been adduced before this

Board that may be said to properly take the place of the evidence of such checker, which was customarily required, by his initials upon the material received report and this Board can not say that the material was received and that the item ought to be paid, and it must, upon the evidence presented, be denied.

3. T. M. Cashin (voucher No. 5878), \$2.65. This item of \$2.65 is on account of no material received report, for one empty whisky barrel. This item was withdrawn at the hearing upon the statement of the Government auditor that the same would be paid by the Air Service if supported by proper evidence.

4. Voucher No. 8203, covering payment to the Shackelford Auto Co., Newport News, Va., various invoices, \$71.07. This Board is of the opinion that so much of this item should be allowed as petitioner may show by proper vouchers was expended upon the repair of automobiles that were owned or used by the White Engineering Co. in the prosecution of the work; but nothing should be allowed upon any repairs made upon automobiles belonging to and used exclusively by the Government, as, in the absence of any evidence, the Government had its own method of repairing its own automobiles, and for such repair the White Engineering Co. was in no way responsible.

(d) Although there was a blanket supplemental claim filed embracing certain total amounts aggregating \$400.96 under the general head of "Miscellaneous deductions," there was no evidence adduced with respect to any such supplemental items that would justify this Board in passing upon same. These items appear not to have been made the subject of any special investigation by Col. Gallagher or Capt. McInerney, such as was made in respect to certain other items hereinbefore set out, and the most that this Board can say in respect to any item here spoken of is that whether or not the auditor pays such items will depend upon whether satisfactory proof is submitted to show that the presumed shortages were not shortages, but that the materials for which the deductions were made were actually received and used on the job.

(e) Freight and express, \$174.03. The items here embraced, after the withdrawal of certain of them, are as follows:

P. P.	Voucher.	Vendor.	Amount.
36	599	Adams Bros. Paint Co.....	\$79. 18
63	512	Western Electric Co.....	40. 00
179	2346	Old Dominion S. S. Co.....	13. 75
225	3739	J. D. Westbrook (Inc.).....	1. 85
239	4122	Strauss Cigar Co.....	. 25
241	4304	.....do.....	. 25
256	4002	Atlas Powder Co.....	33. 95
290	4631	Merchants & Evans Co.....	4. 03
353	7398	John A. Murray Co.....	. 77
Total.....			174. 03

The evidence in respect to these items is all one way, namely, that the shipments were for materials proper to be purchased for the work, and that such materials were paid for by the Government, that the evidence shows that the invoices included the freight and express charges which were paid in advance by the shipper and that these freight and express charges had been paid by the petitioner and that the freight and express charges have not been paid by the Government upon these items. In these circumstances we believe that these items should be paid.

(f) Damages, \$98.27. This claim represents deductions made on account of supplies received in damaged condition and it is presented by the petitioner upon the theory that the Government in the accomplishment of the payment of the freight placed it beyond petitioner's power to make recovery for such damage against the shipper. For reasons heretofore stated in this decision this item can not be allowed.

(g) Miscellaneous, various, \$405.35. These items are made up, for the most part, of shortages in weight, differences in price between the price and the amount paid by the petitioner for supplies, etc. We have examined these items and it appears that there is throughout a lack of that character of proof as to their payment which does not justify this Board in holding that they should be paid by the Government. In the absence of such proof this Board is of the opinion that they can not be allowed. These difficulties arose mostly from the fact that when material or supplies were ordered orally or over the phone, a confirming order for the price understood or the amount ordered was submitted to the Government auditor, and it is claimed that when the goods came in more were received than ordered, or a larger price than that contained in the confirming order, and the Government auditor could only allow the amount and the quantity stated in the confirming order. It is impossible to say that with respect to any particular item for which deduction was made that the goods were actually received or the increased price was actually paid and that reimbursement should be made by the Government. There were many such items which were adjusted at the time when the facts were accessible and the matters were fresh in the minds of the parties actually conducting the work.

Item No. 6, partial payment No. 329, voucher 6629, Bickford Sand & Gravel Co., for \$180, should, however, receive separate consideration. It appears that the petitioner bought the cement, and when the Government paid the invoices it deducted 30 cents apiece for the bags upon the theory that the contractor must return the bags and be paid for them. It further appears that these bags were full of cement at the time the contract was suspended at Langley field, and these bags and cement were left in the hands of the Government; and

there is some evidence that the Government has since returned from to the shipper and been paid for them. Petitioner withdrew this claim tentatively for the purpose of securing payment from the Air Service. This Board is of the opinion that this claim should be paid if it has not already been paid.

Item No. 10, partial payment 358, voucher 4911, involved an amount for the expenses of George J. Hines, jr., which has already been discussed hereinbefore.

Item No. 11, partial payment 79, voucher 1052, J. D. Westbrook (Inc.), for \$1 is an error which can be corrected by the auditors.

Item No. 12, partial payment 293, voucher 5399, has been withdrawn; so has item No. 13, partial payment 300, voucher 5775.

6. Liabilities, \$5,573.60. (a) When the Government let the contract to the White Engineering Co. for the construction of Langley field it was contemplated that the White Engineering Co. would also dig a channel adjacent to the field and use the silt taken out of the river to fill up the shoal land and round out the shore line at Langley field. It was later, however, decided that the White Engineering Co. might sublet the digging of this channel, and by a contract dated November 10, 1917, the digging of this channel was let to the Atlantic, Gulf & Pacific Co. The amount here claimed has not been paid by the White Engineering Co. to the Atlantic, Gulf & Pacific Co., but the latter company has filed a claim with the petitioner, and the matter is now presented before this Board by the petitioner asking payment.

The claim is based upon this notion: That in fixing the price of 15 cents per cubic yard for digging out the main channel of approximately 300,000 cubic yards of material the contractor figured on 2 cents per yard of that price as necessary to take care of digging an auxiliary channel to enable it to carry the silt by scows to the place of deposit; and that the contract between the White Engineering Co. and the Atlantic Gulf & Pacific Co. having been canceled on August 3, 1918, when the Government canceled and terminated its contract with the White Engineering Co., at that time the auxiliary channel having cost \$6,000, and the main channel having been only one-tenth completed, that the contractor is entitled to 2 cents per cubic yard upon all material not removed from the main channel to reimburse the cost of digging out the auxiliary channel. The contract between the White Engineering Co. and the dredging company provided that the channel was to be completed by January 15, 1918. It is a notable fact that on August 3, 1918, only one-tenth of the main channel had been dug. There are many questions presented in this case:

First. Whether or not the auxiliary channel, for which payment is being asked, was necessary to the digging out of the main channel;

Second. Whether or not the contract between the White Engineering Co. and the dredging company gave the White Co. the right to

cancel the contract upon the termination of the contract between the Government and the White Engineering Co.; and

Third. Whether or not the delay by the dredging company in digging out the channel was such a breach of the contract as to preclude the dredging company from making any recovery whatever against the White Co. under the terms of the contract except for the cubic yards actually dug and paid for.

In view of these facts, and especially in view of the fact that the dredging company may not be entitled to recover anything because of a breach of the contract with the White Co. this Board is of opinion that any amount here claimed should be denied, with the right, however, of the petitioner company, upon any settlement between it and the Government, to have the right reserved to present a future claim touching any matter here involved when the rights between the White Co. and the dredging company shall have been determined by a court of competent jurisdiction.

(b) Empire Machinery & Supply Corporation, \$173.60. This amount represents a claim by the Empire Machinery & Supply Corporation against the petitioner because of the deduction by the petitioner of 2 per cent discount upon certain invoices for supplies purchased. The only difference between this item and those embraced under the head of "Discount deductions" is that this discount has not been paid. It is governed by the same principles by which the items under "Discount deductions" are disallowed, and for that reason must be disallowed here. These invoices appear not to have been paid in time to have secured the discounts, and the White Engineering Co. having deducted discounts the Empire Machinery & Supply Corporation is now making a claim for the amount deducted by the White Co., and the passage of this amount by the Government is hereby disallowed.

#### DISPOSITION.

A copy of this decision will be furnished the Claims Board, Air Service, for its information and guidance.

Col. Delafield and Maj. Farr concurring.

JUNE 10, 1920.

**Case No. 2719.**

*In re* **CLAIM OF G. K. SINCLAIR, JR.**

- 1. EXCHANGE AGREEMENT—ORAL CONTRACT.**—Where it is orally agreed between the claimant and the Government that for each barrel of seed potatoes delivered to the Government, at an agreed price of \$4.50 per barrel, the Government would deliver to claimant 2 tons of manure valued at \$2.25 per ton, and claimant delivers 56 barrels of seed potatoes and the Government only delivers to claimant a portion of the manure, the Government is under obligation to pay claimant the difference in value between the potatoes received by it and the value of the manure delivered by the Government.
- 2. CLAIM AND DECISION.**—Claim for \$89 under the act of March 2, 1919, for purchase price of potatoes. Held, an agreement within the meaning of said act.

Mr. Averill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919, and is for \$89, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claim was filed June 16, 1919.
3. On or about July 17, 1918, Walter E. Kruesi, major, Quartermaster Corps, United States Army, salvage officer at port of embarkation, Newport News, Va., entered into an agreement with G. K. Sinclair, Jr., the claimant, by the terms of which said agreement the Government was to deliver to the claimant 2 tons of manure, valued at \$2.25 per ton, for each barrel of seed potatoes, valued at \$4.50 per barrel, delivered to the Government by the said G. K. Sinclair, jr.
4. Under this agreement the claimant delivered to, and there was accepted by, the Government 56 barrels of seed potatoes, of the total value of \$252, and the Government delivered to the claimant 28 ton loads, at \$2.25 per load, and 4 railroad car loads of manure, at \$25 per car, a total value of \$163.
5. The Government was unable to deliver the balance of the manure due and the instant claim was filed for the difference between

the value of the potatoes delivered, namely, \$252, and the value of the manure delivered, namely, \$163, a net difference of \$89.

**DECISION.**

1. From the facts above, it is the opinion of this Board that an agreement within the purview of the act of March 2, 1919, was entered into between the claimant and the Government.

2. That certificate C issue.

**DISPOSITION.**

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.



JUNE 10, 1920.

**Case No. 2439.**

*In re* **CLAIM OF TRUSCON STEEL CO.**

- 1. SUBCONTRACTS—COMMITMENTS.**—Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction and this includes interest and storage charges, where the delay in payment and deliveries was the result of Government action.
- 2. HANDLING CHARGES.**—These can not be allowed, as the only handling done was to load the material on cars and the contract provided f. o. b. cars.
- 3. CLAIM AND DECISION.**—Claim under General Order 103 for \$445.38 commitments. Held, claimant entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under General Order 103. It comes before this Board on appeal from a decision of the Claims Board, Construction Division, which treated it as a class A claim under the act of March 2, 1919. The record does not disclose sufficient facts to bring the claim within the jurisdictional requirements of the act of March 2, 1919, and the claim should be treated as though presented under General Order 103.

The claim involves the question whether charges for storage, handling, and interest due to delays in the performance of a subcontract as a result of the acts of the Government are proper cost commitments to be allowed a prime contractor under the circumstances in this case. The claim is presented in the name of the subcontractor. It amounts practically, however, to a request for a determination of the obligations of the prime contractor to the subcontractor in the above respects.

**STATEMENT OF FACTS.**

1. On the 21st day of September, 1918, the United States Government, Construction Division, entered into a formally executed contract with Val Jobst, jr., and George J. Jobst, a partnership doing business under the name of Jobst & Sons, to furnish in the shortest possible time labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and

completion of the enlargement of the plant of the Holt Manufacturing Co., at East Peoria, Ill.

Article II of said contract provides as follows:

*“Cost of work.*—The contractor shall be reimbursed in the manner hereinafter described for such expenditures in the performance of said work as may be approved or ratified by the contracting officer, and as are included in the following terms.

*“(b)* All subcontracts made in accordance with the provisions of this agreement.”

2. For certain steel sash required by Jobst & Sons for performing the above contract with the Government, the claimant company submitted to Jobst & Sons bids acceptable to that firm. On November 13, 1918, the Construction Division, through R. C. Marshall, jr., brigadier general, United States Army, in charge of Construction Division, by C. M. Foster captain, Quartermaster Corps, issued a proxy-signed requisition order No. 31 directed to the claimant company authorizing and directing said company to proceed with the immediate production of steel sash for enlargement of the plant of the said Holt Manufacturing Co., at East Peoria, Ill. The requisition order recited that the price quoted was to be f. o. b. Youngstown, Ohio, on settlement terms of “30 days net.” It further recited “Confirmation and payment of this order will be made by V. Jobst & Sons,” and directed that the material be consigned to the United States constructing quartermaster, account V. Jobst & Sons, Holt Manufacturing Co., East Peoria, Ill. Jobst & Sons confirmed this order and the claimant company immediately began the manufacture of materials called for in said requisition.

3. On January 3, 1919, the Construction Division wired the claimant and to suspend all action and make no further shipments on said requisition order No. 31, dated November 13, 1918. The material, at the time of this suspension notice, had about all been completed, but none had been shipped.

4. On June 6, 1919, the Government reinstated the original requisition order of November 13, 1918. The reinstatement order was signed R. C. Marshall, jr., brigadier general, United States Army, by C. M. Foster, captain, Quartermaster Corps, and read in part as follows:

“You are hereby authorized to reinstate requisition No. 31, dated November 13, 1918, calling for steel sash, and ship at once all material complete as called for on original requisition. Same shipping and billing instructions to apply.

“Amount due vendor \$7,492, which is arrived at as follows:

Amount of original order.....	\$7, 392
Handling and rehandling charges.....	100
Total.....	7, 492

Jobst & Sons confirmed this reinstatement order, and the claimant shipped the material and received full payment therefor on the 15th day of September, 1919.

5. The claim is presented in two items. The first item is for \$272.20, interest on \$7,392. Interest on this item is claimed from February 1, 1919, the date alleged by claimant upon which the material would have been paid for if the original requisition order had not been suspended, to September 15, 1919, the date upon which payment was actually made. The second item is for outdoor storage from February 1, 1919, to June, 1919, and for rehandling charges on this material to February 1, 1919. This item for storage and rehandling charges is therefore made to run from February 1, 1919, until June, 1919, the approximate shipping date of said material.

6. Between January 3, 1919 and June 6, 1919, negotiations were instituted by the Government with a view either to adjusting claimant's subcontract or reinstating the order and redirecting shipment. These negotiations were pending throughout this period and finally resulted in the reinstatement of the order.

7. The question is whether the above items of claim may be charged by Jobst & Sons as cost commitments. The facts in the case are not disputed.

#### DECISION.

1. Under its contract of September 21, 1918, with Jobst & Sons, the Government obligated itself to reimburse the prime contractor for the actual net expenditures incurred under all subcontracts made in accordance with the provisions of said prime contract. Claimant was a subcontractor of Jobst & Sons, and the provisions of the prime contract in this respect seem broad enough to cover as a cost commitment expenditures such as these claimed herein to the extent that they may be due to the act of the Government. It sufficiently appears that the claimant as a subcontractor was justified in accepting the Government's notice of January 3, 1919, as a suspension of the prime contractor's obligations to receive shipments from claimant and to pay for them in 30 days and of claimant's right to ship and be paid in 30 days. Claimant should, therefore, not be charged with unexpected expense which its prime contractor would not have inflicted on it but for the action of the Government itself. The evidence also justifies the conclusion that claimant was justified in holding the materials on hand for the time it did, and was not guilty of unreasonably increasing the cost to the Government by so doing. In our judgment, the items of this claim are such as a court of law would allow recovery for in a suit by claimant against its prime contractor, Jobst & Sons, because when the Government suspended

shipments under the original requisition order on January 3, 1919, claimant had at that time all its material completed and was entitled to make shipment and receive a 30-day settlement. Shipment and settlement was prevented by the action of the Government, and claimant's capital, representing the value of that material, was tied up and idle. This principle, however, does not apply after the date of June 6, 1919, when the Government reinstated the original requisition. Upon such reinstatement the obstacle to the 30-day settlement was removed, and it then became the duty and lay within the power of the prime contractor to make settlement within 30 days, and consequently of claimant to make shipments. Any delay in settlement thereafter is, therefore, not the fault of the Government.

2. The Claims Board in arriving at an adjustment of the prime contract with Jobst & Sons may, therefore, allow the following as proper items of cost commitment:

(a) Such amount of interest on the cost to claimant of the materials stored by it as claimant might be able to recover in a court of law against Jobst & Sons not exceeding the lawful and customary rate for a period beginning 30 days from the date of notice of termination of the original requisition, viz, January 3, 1919, and ending on the date of the order reinstating such requisition, viz, June 6, 1919.

(b) An amount representing the reasonable and customary charge for outdoor storage upon said material from February 1, 1919, to the said date of reinstatement, June 6, 1919. Storage covering all periods prior to February 1, 1919, has already been paid to claimant.

3. The item of claim covering handling charges is denied. All handling charges up to February 1, 1919, have been paid claimant, and after that date the only charges for that purpose were for loading on cars. This last charge is not proper in view of the fact that the requisition order called for material f. o. b. cars.

#### DISPOSITION.

1. The claim with all papers will be forwarded to the Claims Board, Construction Division, for appropriate action in accordance with this decision.

Col. Delafield and Mr. Bowen concurring.

JUNE 10, 1920.

Case No. Sales BCA-6.

*In re* CLAIM OF CANTON CLOTHING MANUFACTURING CO.

1. **JURISDICTION—SALE—BREACH OF WARRANTY BY THE GOVERNMENT.**—Where surplus property is sold by the Quartermaster General's Department at public auction according to catalogue and upon exhibition of samples, and no contract within the meaning of section 3744, Revised Statutes, is executed, and the Quartermaster General has prescribed no regulations for the sale of surplus property under 6853b, Compiled Statutes, the contract of sale is informal, and since such sale does not come within the purview of the act of March 2, 1919, the Secretary of War has no jurisdiction to adjust a claim for breach of warranty arising from such sale.
2. **CLAIM AND DECISION.**—Claim for \$3,368.05, under General Order 103, for damages for breach of warranty by the Government, in the sale of O. D. twill. Held, the Secretary of War has no jurisdiction of the claim.

Maj. Hill writing the opinion of the Board.

This is a claim under General Order 103 to adjust a dispute under the terms of a contract between the claimant, the Canton Clothing Manufacturing Co., and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold O. D. twill. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

FINDINGS OF FACT.

1. On September 4, 1919, at a public auction at the Manhattan Opera House, New York City, N. Y., claimant purchased auction lot No. 124 listed in the auction catalogue as follows:

“Item No. 124, Material, twill; color, olive drab; width, 34 inches; weight, 22 ounces; construction, 88 by 46; manufacturers, Merrimac; location, Boston; yards, 24,057½.”

This catalogue stated among the conditions of sale that goods “must be removed from the Government warehouse within 30 days.”

2. This material was purchased upon the faith of a sample displayed at the auction, which sample was first-quality goods. It was purchased at 39 cents per yard and was paid for by certified check

drawn in favor of the New York zone supply officer, who gave shipment written on January 3, 1920, to the zone surplus property officer at Boston stating that upon opening this material it was found that following directions on December 5, 1919, to the Boston zone supply office covering the auction of September 4, 1919.

4. Immediately upon discovery of the defects in the goods, claimant to forward this material to claimant. This material was delivered to claimant on or about January 1, 1920.

3. Upon the receipt of the material it was immediately taken into the goods were badly damaged and were not finished by the Merrimac referred by Capt. Higgins of that office to the New York office.

Manufacturing Co. as represented, and requested that immediate attention be given to the matter, as failure to obtain the material bid upon was holding up part of the work in its factory. After writing this letter, claimant proceeded to the Boston Army base and was re-

5. On January 6, 1920, claimant wrote the zone supply office, sur-the claimant's place of business and there, according to custom, spread center, and that the Mount Hope Finishing Co. had finished the goods attention be given to the matter, as failure to obtain the material bid on the wrong side and cut into breeches or coats for the trade. Due and not the Merrimac Manufacturing Co., as listed in the catalogue to the custom of cutting goods on the wrong side the defect in the side. It was then found that the material was badly shaded, side to material was not noticed until about 7,000 yards of the goods had been cut up—the defect not being apparent when viewed from the wrong plus property division, at New York, stating his complaint and asking that a proper allowance be made.

6. On February 11, 1920, this material was examined by Mr. McMillan, a Government inspector, and it was found that the goods were damaged, viz, "that they were badly shaded, side to center, also rowey, and as a result of this damage the value of the material was reduced materially below the standard market price."

7. It is stated by claimant that after the inspector had visited his place, he, without direction, proceeded to "cut them up and sold them at a loss," as he had to have some money "to do business." Claimant also states that he completed work on this material about the last of February, 1920, and has sold all the goods manufactured at a loss of about 19 cents per yard.

8. On March 9, 1920, Col. Purcell, Chief of the Surplus Property Division, wrote claimant that due to the condition of the goods his office was prepared to recommend to the Claims Board a refund of 14 cents per yard if the claimant would accept same. On the same date claimant by indorsement stated as follows:

"The above adjustment will be satisfactory if allowed."

## DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract, but has delivered twill of second quality instead of first quality as offered and purchased by claimant at the auction sale of September 4, 1919.

2. After bringing the defect in the material to the attention of the Government the claimant has cut up and disposed of the goods delivered.

3. Claimant had the privilege of refusing to accept the property or of returning it to the Government, and thereupon rescind the contract entirely. The claimant did not choose to repudiate the contract altogether, but accepted the property as satisfying the contract in part and now seeks to recover damages for the defect. Claimant has not and can not now offer to rescind because he has altered and disposed of the property, and now claims damages for breach of the contract by the Government.

4. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

5. It is the opinion of the Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach of the Government of an informal contract not coming within the provisions of the act of March 2, 1919.

6. This Board is therefore without authority to grant the relief sought by claimant. The claim is accordingly denied.

## DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.



JUNE 10, 1920.

**Case No. 2381.**

*In re* **CLAIM OF THE EIKENBERRY-FITZGERALD CO.**

1. **ASSIGNMENT OF CLAIM—JURISDICTION.**—Inasmuch as section 3477, Revised Statutes, provides that any assignment of a claim against the United States, prior to the allowance of such claim and ascertainment of the amount due and issuing of warrant therefor, shall be null and void, this Board is without jurisdiction to entertain the claim of an assignee, which was assigned prior to the allowance and prior to the ascertainment of the amount due.
2. **CLAIM AND DECISION.**—Claim for \$38,154.38, presented under General Order 103 for damages growing out of a validly executed contract for hay, straw, and bran. Held, no jurisdiction.

Maj. Blackburn writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim, for \$38,154.38, was originally presented to the Fuel and Forage Division, Quartermaster Corps, United States Army, during the month of July, 1918, and was presented to the Board of Contract Adjustment on January 9, 1920, on petition, irregular in form. The claim is for unliquidated damages growing out of a formally executed contract, and arises under the following circumstances:

2. On August 18, 1917, August Fenger & Co., of Cincinnati, Ohio, entered into a formally executed contract with the United States Government to furnish to the United States, f. o. b. Camp Hancock, Ga., certain quantities of hay, straw, and bran, the amounts required being approximately: 2,000,000 pounds of hay, at \$1.19 per hundredweight; 2,400,000 pounds of straw, at 34 cents per hundredweight; 1,200,000 pounds of bran, at \$2.22 per hundredweight. Deliveries were to be called for by the Government between August 20, 1917, and November 20, 1917, upon which last date the contract would terminate by limitation. The following listed calls were made by the Government:

Date of call.	Quantity.	To be delivered.
<b>HAY.</b>		
Aug. 31, 1917.....	<i>Pounds.</i> 1,678,780	Sept. 1 to Oct. 1. <sup>1</sup>
Oct. 27.....	2,000,000	Immediately.
Oct. 31.....	2,000,000	Do.
Nov. 6.....	3,921,220	Do.
Total.....	9,600,000	
<b>STRAW.</b>		
Aug. 18, 1917.....	200,000	At once.
Aug. 31.....	675,900	Sept. 1 to Oct. 1. <sup>1</sup>
Oct. 9.....	224,100	Immediately.
Oct. 11.....	250,000	Do.
Oct. 31.....	250,000	Do.
Nov. 2.....	1,530,000	Do.
Total.....	3,130,000	
<b>BRAN.</b>		
Aug. 8, 1917.....	60,000	At once.
Aug. 31.....	60,000	Sept. 1 to Oct. 1. <sup>1</sup>
Oct. 2.....	120,000	Immediately.
Nov. 16.....	250,000	Do.
Total.....	490,000	

<sup>1</sup> As called for.

3. At a hearing held on May 21, 1920, it developed that the claim is substantially as follows:

“(a) For freight paid on hay, straw, and bran under contract with the United States of America, the same having been contracted to be shipped to ‘Camp Hancock, Augusta, Ga.,’ and afterwards transferred to ‘Camp Hancock, Wheless, Ga.,’ at an excess of 3½ cents per hundredweight, totaling \$4,517.34.

“(b) For loss on straw shipped by August Ferger & Co. on order of the United States of America in excess of its contract, being the difference between the price paid therefor by August Ferger & Co. on said date of shipment, plus freight, and the amount paid therefor by August Ferger & Co. to the United States of America, a total of \$625.

“(c) For loss sustained by August Ferger & Co. on hay shipped by it to said ‘Camp Hancock’ in excess of the amount claimed by August Ferger & Co., to be due under said contract compelled to be shipped on order of the United States of America, a total of \$35,259.50.

“(d) For loss sustained by August Ferger & Co. on straw shipped by it to said ‘Camp Hancock’ in excess of the amount claimed by August Ferger & Co. to be due under said contract compelled to be shipped on order of the United States of America, a total of \$2,355.55.”

4. It further appears that on May 5, 1919, August Ferger & Co., in a general transfer of all of its assets, attempted to assign this claim, among other claims against the United States Government, to the Eikenberry-Fitzgerald Co., of Cincinnati, Ohio. The purported assignment is here quoted:

“For value received, the undersigned, August Ferger & Co., a partnership of Cincinnati, Ohio, does hereby sell, assign, and transfer

its various claims against the United States of America, to the Eikenberry-Fitzgerald Co., a corporation under the laws of the State of Ohio, and hereby authorize and direct the said the Eikenberry-Fitzgerald Co. to prosecute its claim against the said the United States of America, to accept and receive for in its name or in the name of the undersigned for said claims, and further authorize the said United States of America to pay any and all sums found due August Ferger & Co. to the said the Eikenberry-Fitzgerald Co.

"Dated at Cincinnati, Ohio, this 5th day of May, 1919.

"AUGUST FERGER & Co.,  
"By AUGUST FERGER."

#### DECISION.

1. The relief prayed for in this case will be denied for two reasons:  
(1) The attempted assignment of this claim by August Ferger & Co. to the Eikenberry-Fitzgerald Co. is not in accordance with section 3477, Revised Statutes, act of July 29, 1846, which contains the following provisions:

"All transfers and assignments made of any claim upon the United States, \* \* \* shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due*, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment *and must be acknowledged* by the person making them, before an officer having authority to take acknowledgments of deeds \* \* \*."

This assignment is therefore null and void and of no force or effect, and the claimant, the Eikenberry-Fitzgerald Co., has no standing thereunder. Accordingly, the Board of Contract Adjustment is without jurisdiction to entertain the claim. (2) It appearing from the record that this claim arises under a formally executed contract within the meaning of section 3744, Revised Statutes, and which has been terminated by full performance upon the part of the contractor, the powers of the Secretary of War to adjust this claim have ceased to exist.

#### DISPOSITION.

1. The Board of Contract Adjustment will enter a final order denying relief.

Col. Delafield and Mr. Marcum concurring.

JUNE 10, 1920.

**Case No. 2566.**

*In re* **CLAIM OF FERGUS MOTORS OF AMERICA (INC.).**

- 1. TRAVELING EXPENSES.**—Where a representative of claimant made a trip to Washington at the request of the Government and also to Boston, both of which trips were for the purpose of informing the claimant as to the manufacture and construction of a machine for which claimant contemplated taking contracts, and contracts are thereafter entered into, there is no obligation on the part of the Government to reimburse claimant for the expense of said trips in the absence of an agreement, express or implied.
- 2. CLAIM AND DECISION.**—Claim for \$114.70 under the act of March 2, 1919, for traveling expenses. Held, no agreement within the meaning of said act.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Air Service, on a claim for \$114.70 by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claim is for \$114.70 for traveling expenses of Mr. J. B. Ferguson of the Fergus Motors of America (Inc.), from Newark, N. J., to Washington, D. C., on October 30, 1918, in the amount of \$26.70, and the expenses of Messrs. Ferguson, Ruggles, and Ryder from Washington, D. C., to Boston, Mass., and return to Newark, N. J., in the amount of \$88, making a total claim of \$114.70.
3. In the month of October, 1918, First Lieut. William F. Carroll, Air Service production expert, visited, among other factories, the Fergus Motors of America (Inc.), with a view to placing an order for orientators. He found that the Fergus Motors of America (Inc.) was willing to undertake the manufacture of orientators, and on his return to Washington reported the willingness of the Fergus Motors of America (Inc.) to manufacture the orientators to Capt. E. A. Hults, his immediate superior.

4. On October 29, 1918, the following telegram was sent to claimant:

FERGUS MOTORS OF AMERICA (INC.),  
Newark, N. J.

Send representative for conference 9 a. m. Wednesday, the 30th, Fourth and Missouri Avenue, wing 6, floor 3.

AIRCRAFT ACCESSORIES—HULTS.

5. In response to the above telegram Mr. J. B. Ferguson, of the Fergus Motors of America (Inc.), came to Washington and had a conference with Capt. Hults and Lieut. Carroll, during which conference Lieut. Carroll was present throughout.

6. At this conference the manufacture of orientators was thoroughly discussed and a tentative proposal was drawn up and agreed upon between the claimant and the Government whereby claimant was to manufacture the orientators on a cost-plus arrangement.

7. At this conference it was suggested that Mr. J. B. Ferguson should go to Boston, where an orientator had been built, and take Mr. Ruggles, the inventor, along with him for the purpose of getting the details of the manufacture of the machine. Mr. Ferguson went to Boston, taking with him Mr. Ruggles and also Mr. Ryder, who was the chief engineer of the Fergus Motors of America (Inc.).

8. On January 7, 1919, contracts numbered 5399–5400 (orders numbered 750172–75073) were entered into by and between the Fergus Motors of America (Inc.) and the Government on a cost-plus basis, wherein the Fergus Motors of America (Inc.) agreed to make and deliver to the Government 14 Ruggles orientators.

9. The orientators called for in the contracts were manufactured, delivered to, accepted, and paid for by the Government.

DECISION.

1. The trip to Washington was made for the purpose of discussing possible contracts with the Government.

2. The trip to Boston was for the purpose of enabling Mr. Ferguson and the engineer of the claimant to inform themselves as to construction and manufacture of the machine, for the production of which the claimant contemplated taking contracts.

3. Subsequently contracts were entered into as had been expected.

4. There was no express agreement by any Government official to pay the expense of the trips, and we do not find that any is to be implied from the facts.

DISPOSITION.

A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.

JUNE 20, 1920.

**Case No. Sales BCA-1.**

*In re* **CLAIM OF PHILIP P. SMITH CO.**

1. **RETURN OF DEPOSIT.**—Where claimant in buying Government property was required to deposit 10 per cent of the contract price to insure payment, it is not entitled to return of its deposit while a dispute as to the amount of material to which it is entitled is pending.
2. **CLAIM AND DECISION.**—Claim presented under General Order 103 for the return of claimant's deposit amounting to \$4,531.48. The original claim was also presented under General Order 103 and involved the question of how much material claimant was entitled to receive under its contract with the Government. That claim was decided by this Board on April 19, 1920, adversely to claimant who, thereupon, appealed from the decision. Claimant thereupon applied for return of the money which it had deposited at the time of entering into the contract. Held, that in view of claimant's contention that it is entitled to further deliveries of material the deposit should remain in statu quo until the question is finally determined. For the facts see the prior decision of this Board.

Maj. Hill writing the opinion of the Board.

This is a claim arising under General Order 103 to adjust a dispute under the terms of a contract between the claimant and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold certain steel and iron at Portlock, Norfolk, Va. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

**FINDINGS OF FACT.**

1. This claim was heard by this Board upon claimant's contention that the sale was a sale in bulk rather than of a specified amount and that it was entitled to delivery at the fixed price per pound of the entire lot of bars at Portlock, which was largely in excess of the amount stated in the Surplus Property Division letter of acceptance of bid. The facts are stated in the decision of the Board dated April 19, 1920, which held that the contract was for a specified amount and that claimant had received delivery of that amount.

2. The claimant has appealed from that decision of the Board and the appeal is now pending.

3. The claimant now seeks to recover the sum of \$4,531.48, the amount of the certified check deposited with the Government when the contract was made.

4. It was the practice of the Surplus Property Division to require a deposit of 10 per cent of the contract price when the contract was made, to require payment for each shipment before delivery, and to apply the deposit in payment of the last shipment under the contract. In this case the claimant paid for each shipment as made, and the deposit was not applied against the last shipment.

#### DECISION.

It is the opinion of this Board that in view of claimant's contention that it is entitled to further shipments to the extent of the whole of the material at Portlock and its appeal from the decision of this Board denying that contention, the deposit should remain in statu quo until the appeal is finally determined.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.



JUNE 11, 1920.

**Case No. Sales BCA-3.**

*In re* **CLAIM OF F. A. BRADY (INC.).**

1. **JURISDICTION.**—The Secretary of War has no authority to adjust or settle a claim for damages based upon a breach by the Government of a formal contract which has been fully performed.
2. **SALES—ACCEPTANCE—RESCISSION.**—Where the claimant bought goods from the Government by description and partial inspection and receives the goods and retains them, although they do not comply with the description, and sells them, it can not have a rescission of the contract.
3. **CLAIM AND DECISION.**—Claim under General Order 103 on formal contract for \$6,202.43 damages on breach of contract. Held, no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under General Order 103 to adjust a dispute under the terms of a formal contract between the claimant, F. A. Brady (Inc.), and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold certain candy. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, is for an adjustment of this dispute.

**FINDINGS OF FACT.**

1. During September, 1919, the New York surplus property office was authorized by Col. Elliot, chief of the subsistence section of the Surplus Property Division in Washington, to sell by negotiation all surplus candy at New York, with instructions that the minimum price to be accepted by the Government for such candy was to be 70 per cent of its original cost to the Government.

2. As a result of this sale of candy by the New York office, F. A. Brady (Inc.), the claimant herein, through its vice president, Mr. V. E. Mitler, bought several lots of candy. One of the lots bought by F. A. Brady (Inc.) was Chin Chin candy, which is the subject of the present claim against the Government.

3. During the month of August or September, 1919, Mr. Mitler, the vice president of claimant company, interviewed Capt. Hebblethwaite, assistant supply officer at New York, and was shown a list of chocolates which were for sale by that office. This list showed certain Chin Chin chocolate bars which were inspected by Mr. Mitler

at the Brooklyn supply base. After inspection on October 6, 1919, claimant entered into a contract for the purchase of Chin Chin chocolate bars, which contract read as follows:

NEW YORK, *October 6, 1919.*

SURPLUS PROPERTY OFFICER, UNITED STATES ARMY,  
*Thirty-fourth and Eighth Avenue, New York.*

DEAR SIR: Beg to hand you herewith our certified check for \$19,471.80, in full payment for two lots of Chin Chin sweet eating chocolate in 2-ounce packages, 705 cases, ticketed 2383; 706 cases, ticketed 4678, all located in A 610, amounting to 84,660 pounds; total at 23 cents per pound.

We are buying this material subject to inspection and that the goods are in good condition, and your acknowledgment of this constitutes a delivery on your warehouse in Brooklyn.

Very truly, yours,

F. A. BRADY (INC.),  
B. E. MITLER.

Accepted.

J. R. HEBBLETHWAITE,  
*Surplus Property Officer for the United States Army.*

On the same date, that is, October 6, 1919, claimant deposited a certified check for \$19,471.80, in full payment of the goods bought under this contract, and received a receipt from Capt. Hebblethwaite. Immediately after the purchase of this candy claimant again proceeded to the Brooklyn Army supply base and again inspected the candy. This candy looked like chocolate, tasted like chocolate, and was manufactured by the Rainbow Chocolate Co.

4. The claimant then attempted to sell the candy to the Chemical Export & Importing Co., but this candy was refused by the company on the ground that it was not chocolate in accordance with the United States pure-food laws. Immediately upon the rejection of this candy by the Chemical Export & Importing Co. claimant had a chemical analysis made of the candy by Stillwell & Gladding, chemists, New York City. This analysis, which is substantiated by a later analysis made by the Government, showed that this was not sweet eating chocolate as provided by the pure-food standards of the Department of Agriculture of the United States.

5. Upon refusal of the Chemical Co. to accept this candy as not complying with the pure-food laws of the United States, Mr. Mitler went to see Capt. Hebblethwaite about October 15, 1919, and suggested that the goods be returned and the money refunded. Upon being informed by Capt. Hebblethwaite that he could not tell just when the money could be returned claimant decided to sell the candy for the best price possible and claim the difference from the Government.

6. On November 5, after receipt of the analysis from the chemists, claimant wrote the surplus property officer at New York, making a claim to offset the loss sustained by reason of the defect in the candy, and again on November 22 wrote as follows, making a specific claim:

New York, November 2, 1919.

SURPLUS PROPERTY OFFICER, UNITED STATES ARMY,  
*Thirty-fourth Street and Eighth Avenue,*  
*New York City.*

GENTLEMEN: In connection with the sale of Chin Chin bars to us we give you herewith a statement in connection with same.

Paid for materials.....	\$19,471.80
Interest at 6 per cent, Oct. 6 to Oct. 31.....	84.38
Interest, \$6,000, 6 per cent, Oct. 31 to Nov. 24 (approximately).....	25.00
Trucking.....	819.93
Storage.....	112.32
Insurance (approximately).....	25.00
Overhead.....	2,200.00
Total.....	22,738.43
Selling price.....	16,536.00
Difference.....	6,202.43

Very truly, yours,

F. A. BRADY (Inc.).

After this communication with Capt. Hebblethwaite claimant proceeded to sell the chocolate on hand at the best price possible for goods that did not comply with the pure-food law, which was sold at 20 cents per pound. It is stated both by Mr. Mitler and Capt. Hebblethwaite that this was an exceedingly good price for candy of that character. It is also stated by the claimant that if this candy had been as represented—that is, chocolate—a reasonable price would have been from 34 cents to 36 cents per pound.

7. The sole contention of claimant here is that it bought sweet eating chocolate, but that the goods actually sold to it by the Government was not sweet eating chocolate, nor was it chocolate within the meaning of the laws of the United States.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract, but has delivered candy which was not chocolate within the provisions of the pure-food laws of the United States.

2. Claimant had the privilege of refusing to accept the candy or of returning it to the Government and thereupon rescind the contract entirely. The claimant did not choose to repudiate the contract

altogether, but accepted the candy, as stated in the contract in part, and now seeks to recover damages for the defect. Claimant has not and can not now offer to rescind, because he disposed of the property and now claims damages for breach of the contract by the Government.

3. This contract was a formal contract within the provisions of section 3744, Revised Statutes.

4. It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of a formal contract which has been fully executed by performance.

5. This Board is therefore without authority to grant relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 12, 1920.

**Case No. 2437.**

*In re* **CLAIM OF TRUSCON STEEL CO.**

1. **SUBCONTRACTS—COMMITMENTS.**—Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction, and this includes interest and storage charges, when the delay in payment and deliveries was the result of Government action; but where it was the fault of the prime contractor they may not be charged against the Government.
2. **HANDLING CHARGES.**—These can not be allowed, as the only handling done was to load the material on cars and the contract provided f. o. b. cars.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,154.74 for interest and storage. Held, claimant entitled to recover in part.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. No formal statement of claim has been filed, but the claim comes before this Board on appeal from a decision of the Claims Board, Construction Division, which treated it as a class A claim.

The claim involves the question whether charges for storage handling and interest due to delays in the performance of a subcontract as a result of the acts of the Government are proper cost commitments to be allowed a prime contractor under the circumstances in this case. The claim is presented in the name of the subcontractor. It amounts practically, however, to a request for a determination of the obligations of the prime contractor to the subcontractor in the above respects.

**STATEMENT OF FACTS.**

1. On the 7th day of September, 1918, the United States Government, Construction Division, entered into a formally executed contract with the Austin Co., of Cleveland, Ohio, to furnish in the shortest possible time labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the enlargement of a plant for manufacturing 155-millimeter shells on property of the Laclede Gas Light Co. at St. Louis, Mo.

Article II of said contract provides as follows:

*"Cost of work.*—The contractor shall be reimbursed in the manner hereinafter described for such expenditures in the performance of said work as may be approved or ratified by the contracting officer, and as are included in the following items."

"(b) All subcontracts made in accordance with the provisions of this agreement."

2. For certain steel sash required by the Austin Co. for performing the above contract with the Government the claimant company submitted bids acceptable to that company. On October 29, 1918, the Construction Division, through R. C. Marshall, jr., brigadier general, United States Army, by C. M. Foster, captain, Quartermaster Corps, issued a proxy-signed requisition order No. 11 directed to the claimant company authorizing and directing said company to proceed with the immediate production of steel sash for the plant of the said Austin Co. The requisition order recited that the price quoted was to be f. o. b. Youngstown, Ohio, on settlement terms of "30 days net." It further recited "Confirmation and payment of this order will be made by the Austin Co.," and directed that the material be consigned to the United States constructing quartermaster, Laclede Gas Light Co. Broadway plant, account the Austin Co. The Austin Co. confirmed this order and the claimant company immediately began the manufacture of materials called for in said requisition.

3. On December 2, 1918, the Construction Division telegraphed the claimant to suspend all action and make no shipments on said requisition order No. 11, dated October 29, 1918. The material, at the time of this suspension notice, had about all been completed, and a part had been shipped on November 16, 1918.

4. On May 16, 1919, the Government reinstated the original requisition order of October 29, 1918. The reinstatement order was signed "R. C. Marshall, jr., brigadier general, United States Army, by C. M. Foster, captain, Quartermaster Corps," and read in part as follows:

"You are hereby authorized to reinstate unshipped balance of order dated October 29, 1918, originally ordered for Broadway plant of Laclede Gas Co., of St. Louis, Mo.

"It being understood that an amount of sash invoiced at \$2,056 has already been shipped to St. Louis, and if paid, this amount is to be deducted from total given below.

Amount of original contract.....	\$18, 150. 00
Additional sash on account of revised drawing.....	720. 92
Inward handling charges.....	200. 00
Unloading car.....	100. 00

Total amount.....	19, 181. 16
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On June 20, 1919, claimant was given a supplemental requisition in effect confirming the above order of May 16, 1919, but reducing the total balance figure stated to be due claimant to \$15,577.16.

The Austin Co. confirmed these reinstatement orders, and the claimant shipped the material and received full payment therefor on the 17th day of September, 1919.

5. The claim is presented in three items. The first item is for interest on \$2,056, the amount of the first shipment, from December 16, 1918, being 30 days from date of shipment, to September 17, 1919, the date upon which payment was made to claimant.

The second item is interest on balance of material in amount of \$13,521.16 shipped later, calculated from February 1, 1919, "the date on or before which materials would have been shipped and payment due but for suspension," to September 17, 1919, the date of payment.

The third item is storage and rehandling from February 1, 1919, to May 16, 1919, the date of reinstatement of the original order.

6. Between December 2, 1919, and May 16, 1919, negotiations were instituted by the Government with a view either to adjusting claimant's subcontract or reinstating the order and redirecting shipment. These negotiations were pending throughout this period and finally resulted in the reinstatement of the order.

7. The question is whether the above items of claim may be charged by the Austin Co. as cost commitments. The facts in the case are not disputed.

#### DECISION.

1. Under its contract of September 7, 1918, with the Austin Co., the Government obligated itself to reimburse the prime contractor for the actual net expenditures incurred under all subcontracts made in accordance with the provisions of said prime contract. Claimant was a subcontractor of the Austin Co., and the provisions of the prime contract in this respect seem broad enough to cover as a cost commitment expenditures such as these claimed herein to the extent that they may be due to the act of the Government. It sufficiently appears that the claimant as a subcontractor was justified in accepting the Government's notice of December 2, 1918, as a suspension of the prime contractor's obligations to receive shipments from claimant and pay for them in 30 days and of claimant's right to ship and be paid in 30 days. Claimant should, therefore, not be charged with unexpected expense which its prime contractor would not have inflicted on it but for the action of the Government itself. The evidence also justifies the conclusion that claimant was justified in holding the materials on hand for the time it did, and was not guilty of unreasonably increasing the cost to the Government by so doing. In our judgment the items of this claim are such as a court of law would allow recovery for in a suit by claimant against its prime contractor, the Austin Co., because when the Government suspended shipments under the original requisition order on December 2,



1918, claimant had at that time all its material completed and was entitled to make shipment and receive a 30-day settlement. Shipment and settlement was prevented by the action of the Government, and claimant's capital, representing the value of that material, was tied up and idle. This principle, however, does not apply after the date of May 16, 1919, when the Government reinstated the original requisition. Upon such reinstatement the obstacle to the 30-day settlement was removed, and it then became the duty and lay within the power of the prime contractor to make settlement within 30 days, and consequently of claimant to make shipments. Any delay in settlement thereafter is, therefore, not the fault of the Government.

2. The Claims Board, Construction Division, in arriving at an adjustment of the prime contract September 7, 1918, with the Austin Co. may, therefore, allow the following as proper items of cost commitment:

(a) Such amount of interest on the cost to claimant of the materials stored by it not exceeding \$13,521.16 as claimant might be able to recover in a court of law against the Austin Co. not exceeding the lawful and customary rate for a period beginning 30 days from the date of notice of termination of the original requisition, viz, December 2, 1919, and ending on the date of the order reinstating such requisition, viz, May 16, 1919.

(b) An amount representing the reasonable and customary charge for outdoor storage upon said material from February 1, 1919, to the said date of reinstatement, May 16, 1919.

3. The item for interest on \$2,056, being the amount of the material actually shipped by claimant on November 16, 1918, to the Austin Co., is denied. This shipment was made to the prime contractor before the Government sent to claimant the suspension notice, and the obligation to pay claimant therefor rested entirely with the prime contractor. As the interest charge claimed is based only on delay in this payment for the material, such a charge is one for which the Government is in no way responsible and for which claimant should look to the prime contractor.

4. The item of claim covering handling charges is denied. All handling charges up to February 1, 1919, have been paid claimant, and after that date the only charges for that purpose were for loading on cars. This last charge is not proper in view of the fact that the requisition order called for material f. o. b. cars.

#### DISPOSITION.

The claim with all papers will be forwarded to the Claims Board, Construction Division, for appropriate action in accordance with this decision.

Col. Delafield and Mr. Bowen concurring.

JUNE 12, 1920.

Case No. 2480.

*In re* CLAIM OF CHAMBERLAIN MACHINE WORKS.

1. **DEVELOPMENT COSTS.**—Under the act of March 2, 1919, in the settlement of an informal contract, the contractor is entitled to be reimbursed for its unamortized development costs, incurred in performing or preparing to perform the agreement.
2. **EXPENSE OF BORROWING MONEY.**—A sum paid by claimant to two individuals as a consideration for indorsing its note given as security for a Government loan is not a reimbursable item of cost.
3. **COST OF PREPARATION OF CLAIM.**—Items of cost attributed to preparation of the claim under a suspended contract are not reimbursable.
4. **INCREASED LABOR COST.**—In the absence of special agreement cost resulting from wage increases alleged to have been made by advice of a Government representative is not a reimbursable item of cost.
5. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a proxy-signed contract for machining 75-millimeter shells. The claim as considered by the Ordnance Claims Board was for \$140,811.99. That board disallowed several items and claimant took an appeal to this Board. Claimant thereafter filed supplementary claims so that the claim totaled \$188,642.63, of which the disputed items amount to \$96,026.10. Held, claimant is entitled to be reimbursed one item of cost; others disallowed.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case comes to the Board of Contract Adjustment on an appeal from a decision of the Ordnance Claims Board, Washington, D. C., and is for approximately \$188,642.63 on an informally executed contract.
2. The contractor was engaged in the production of 75-millimeter shell for the Ordnance Department, United States Army, under a contract known as War Ord. P7233-2251A, dated May 3, 1918. Notice of suspension of production was given claimant by the Government on December 17, 1918, but production on partly finished products was permitted until January 31, 1919.
3. One hundred thirty-seven thousand three hundred and two machined and banded shell were accepted by the Government and paid for at the contract price. The number of shell so delivered and paid for amounted to 37.6 per cent of the entire number con-

tracted for, leaving a balance of 62.4 per cent or 227,698 shell undelivered.

4. Negotiations were entered into between the Chicago ordnance district claims board and the claimant company for a settlement; an understanding was reached, an award recommended and accepted by the claimant subject, however, to the approval of the Ordnance Claims Board, Washington. The latter board disallowed certain items included in the proposed settlement whereupon claimant appealed to the Board of Contract Adjustment and at the time of said appeal filed certain supplementary items of claim.

5. A tabulated statement showing the items allowed by the Chicago district board and accepted by claimant, the items disallowed by the Ordnance Claims Board, Washington, and the supplementary items claimed by claimant are all fully set up below.

6. A hearing has been had, at which hearing both the claimant and the Government were represented by counsel.

Items.	As allowed by—		Items in dispute.
	Chicago Ordnance Board.	Washington Ordnance Claims Board.	
1. Unworked direct materials.....	\$1,963.30	\$1,963.30	.....
2. Indirect direct materials.....	6,597.97	6,597.97	.....
3. Direct labor overhead.....	12.35	12.35	.....
4. Commitments.....	2,273.99	2,273.99	.....
5. Claims for other compensation:			
(a) Equipment cost.....	55,463.88	57,254.28	.....
(b) Interest cost.....	6,030.45	7,069.00	.....
(c) Indorsement cost.....	18,278.22	(1)	\$18,278.22
(d) Excess cost (contractor claims \$47,122.45).....	37,565.83	(1)	37,565.83
(e) Miscellaneous expense.....	8,879.22	8,879.22	.....
(f) Legal expense.....	848.16	(1)	848.16
(g) Interest.....	2,098.62	(1)	(2)
(h) Traveling expense.....	240.00	240.00	.....
(i) Rent.....	260.00	260.00	.....
(j) Salary.....	300.00	300.00	.....
Supplementary amounts claimed:			
(k) Storage charges on property part owned by Government and part by claimant.....			355.32
(l) Attorney fees.....			2,880.79
(m) Traveling expenses incurred in preparing claim.....			1,037.55
(n) Salaries.....			1,750.00
(o) Actual expense exceeding revenue account maintenance of organization from Feb. 1, 1919 to Jan. 20, 1920.....			25,810.23
(p) Expenses account adjustment resulting in wage increase alleged to have been made by advice of district ordnance chief.....			7,500.00
Total.....	140,811.99	84,850.71	96,026.10

<sup>1</sup> Disallowed.

<sup>2</sup> Not contended for.

7. The contract contained a cancellation clause which, among other things, provides:

"The United States will also pay to the contractor the cost of the component materials and parts then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specifications referred to in Schedule 1

hereto attached, and also all costs theretofore expended and for which payment has not previously been made and all obligations incurred solely for the performance of this contract of which contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract."

DECISION.

1. The basis for adjustment agreed upon in the termination clause is one of cost and remuneration, so that in any adjustment to be made under the act of March 2, 1919, the basis laid down in said termination clause may be followed as a fair and equitable basis for the negotiation of a settlement agreement. Prospective or possible profits are thus eliminated, but reasonable remuneration for expenditures, obligations, or liabilities necessarily incurred in performing or preparing to perform the contract are allowed under the provisions of the said act.

2. Item (c), indorsement cost, \$18,278.22. The evidence shows that during the performance of the contract the contractor borrowed \$100,000 from the War Credits Board; that it was unable to obtain sureties under ordinary business arrangements and entered into an agreement with W. L. Abbot and Olaf F. Oleson, two mechanical engineers of Chicago, by the terms of which agreement the claimant was to pay to the parties mentioned the sum of \$36,500 for their indorsement upon the notes given to secure the loan aforesaid. These engineers also undertook to render engineering service to the claimant in connection with the performance of the contract with the United States Government. This amount was subsequently reduced to \$29,300, and in reducing said amount an expenditure of \$848.16 was incurred for legal services. This is item (f) in tabulated statement.

The contract contemplates that the contractor shall provide its own capital and does not contemplate that if by reason of contractor's financial standing being such that contractor is unable to negotiate loans upon the customary and ordinary legal rates, and for its own benefit enters into agreements contemplating unusual and extraordinary financing, that the Government should bear any proportion of the cost of same.

For these reasons the Board is of the opinion that item (c), amounting to \$18,278.22, should be disallowed, and the decision of the Ordnance Claims Board disallowing same is hereby sustained.

3. Item (d), excess cost, \$37,565.83. This item represents approximately the unamortized portion of the sum of \$75,901.64 which was expended in the development of shop practice, in machinery operation, in heat-treating department, in rearranging machinery, and training of employees during the preliminary stages of produc-

tion. This amount was allowed by the Chicago district board and accepted by the contractor and was only objected to by the Ordnance Claims Board, Washington, on the ground that there was no evidence at that time to indicate the character of the work to which this item was to apply.

It is the opinion of the Board that the contractor is entitled to reimbursement for the unamortized portion of expenses incurred in rearranging machinery, training of employees, and developing shop practice.

4. Item (*f*), legal expense, \$848.16. This item represents legal expenditures made by the contractor in an endeavor to reduce the claims of W. L. Abbot and Olaf F. Oleson against the contractor from \$36,500 to \$29,300. This is clearly not an expense incurred for the performance of the contract, and it is, therefore, the opinion of the Board that the same should be disallowed, and the decision of the Ordnance Claims Board disallowing same is hereby affirmed.

5. Item (*k*), storage charges on property part owned by Government and part by claimant, \$355.32. The salvage value of this property has not yet been determined and in the opinion of the Board storage charges should be left for determination by the parties.

6. Item (*l*), attorney fee, \$2,880.79. This item represents in part attorney fees alleged to have been contracted in the period from June 1, 1918, to February 1, 1919, and in part from February 1, 1919, to February 1, 1920. Attorneys fees are clearly not expenses within the contemplation of the contract, and it is the opinion of the Board that this item must be disallowed.

7. Item (*m*), traveling expenses incurred in preparing claim, \$1,037.55. This item being clearly not expenses in connection with performance of the contract, the Board is of the opinion that the same should be disallowed.

8. Item (*n*), salaries, \$1,750. This item represents salaries paid to F. L. Chamberlain, president of the claimant company, from September 15, 1919, to April 15, 1920. This item being also for expenses incurred apart from the performance of the contract, it is the opinion of the Board that same must be disallowed.

9. Item (*o*), actual expense, exceeding revenue, account maintenance of organization from February 1, 1919, to January 20, 1920, \$25,810.23. This item is based on the theory that the long pendency of settlement of the claim has forced claimant's plant to lie idle. The Board being unable to find any legal or equitable reason for the allowance of this item, the same is, therefore, disallowed.

10. Item (*p*), expenses of adjustment resulting in wage increase alleged to have been made by advice of district ordnance chief, \$7,500. The evidence shows that during production disputes arose

between the contractor and its labor and that claimant adjusted the differences with its labor by paying increased price. There is no evidence that claimant was forced to make these advances by the officers or agents of the Government and no evidence of any promise if claimant would make increases that the Government would reimburse it for same.

The Board is, therefore, of the opinion that this item must also be disallowed.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Ordnance Department, for action in accordance therewith.

Col. Delafield and Mr. Hopkins concurring.

JUNE 12, 1920.

**Case No. 2618.**

*In re* **CLAIM OF NORTHWESTERN FURNITURE CO.**

1. **AWARDS, FINALITY OF—REOPENING.**—Where an award has been made to a claimant by a bureau claims board and accepted in writing by claimant, it will not be reopened in the absence of clear proof of mutual mistake or of fraud.
2. **CLAIM AND DECISION.**—Claim for \$1,366.14, on appeal from decision of Claims Board, Office of Director of Purchase. Held, claimant not entitled to recover.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises on appeal from a decision of the Claims Board, Office of the Director of Purchase, refusing to reopen a settlement made in connection with certain contracts between the claimant and the Government.

2. It appears that the claimant had three contracts numbered, respectively, P10762-5699Eq, P10761-5698Eq, and P10763-5700Eq.

3. The claimant's contracts were terminated at the time of the armistice and the claimant took up the question of settlement with the zone supply officer at Chicago and the Claims Board, Office of the Director of Purchase. The contracts not being formally executed, certificate C was issued in each case. The amounts due were thereupon determined. Awards were drafted authorizing the payment of \$16,071.43. These awards were duly accepted in writing by the claimant "in full adjustment, payment, and discharge" of the agreements covered.

4. Thereafter the claimant sought to reopen the awards for the purpose of adding certain items which it claimed it neglected to insert in its claim when the amounts due were being calculated.

5. The Claims Board, Director of Purchase, declined to reopen the settlement.

6. The case was set down for hearing before this Board. The claimant was notified, but declined to appear, submitting, however, certain letters and affidavits from which it appears that its claim is for packing boxes alleged to have been used in connection with



the performance of its contracts. The amount of the claim is approximately \$300.

DECISION.

1. The only question before this Board is whether the settlement already arrived at should be reopened.

2. The claimant has signed three awards, each of which is expressed to be in full adjustment, payment, and discharge of its agreement with the Government. The main purposes of an award of this kind are two: First, to determine and authorize the payment of the amount due to the claimant; second, to release the Government from all claims in connection with a particular matter upon payment of a sum certain. Both of these considerations are material elements in the transaction. If awards of this kind could be opened upon the allegation of a claimant that something has been forgotten, they would amount to very little. They are intended as a final determination of the rights between the parties. It has been determined in a number of decisions of this Board following the decisions of the Supreme Court and of the comptroller that in the absence of clear proof of a mutual mistake, a formal agreement of this kind will not be set aside. (See *Acme Steel Goods Co.*, case No. 2633, Bd. Cont. Adj.; *Standard Textile Products Co.*, case No. 2455, Bd. Cont. Adj.; *C. R. Wilson Body Co.*, case No. 2465, Bd. Cont. Adj.; *United States v. Cramp*, 206 U. S., 118; *Decisions of the Comptroller*, vol. 26, p. 850.)

3. We do not find from any evidence in the case that mutual mistake has been made.

DISPOSITION.

1. Claimant's appeal is hereby dismissed.  
Col. Delafield and Mr. Tanner concurring.

JUNE 12, 1920.

**Case No. 2706.**

*In re* **CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.**

1. **RAILROAD FACILITIES—IMPLIED AGREEMENT.**—The construction of railroad facilities to handle traffic in connection with any Army cantonment does not raise an implied agreement on the part of the Government to pay for same.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$28,971.85, based upon an implied agreement in relation to the construction of railroad facilities at Camp Wadsworth. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Transportation Service Claims Board, War Department, on a claim for \$28,971.85, on an alleged oral contract, under the following circumstances:

2. In the fall of 1917 the Government established a National Guard cantonment near Spartanburg, S. C., and said camp was known as Camp Wadsworth.

3. The Chamber of Commerce of the City of Spartanburg took up the matter of spur tracks in and near the camp with claimant, the Piedmont & Northern Railway Co., and requested claimant company to construct certain passenger spur tracks from Lenwood block office to Whitman Station, Camp Wadsworth.

4. In order to construct such spur track it was necessary to pass over the United States reservation, and the chamber of commerce arranged a meeting between E. Thomason, vice president and general manager of claimant company, and Brig. Gen. Charles L. Phillips, in command of Camp Wadsworth, S. C. At this meeting the evidence discloses that no promises were made upon the part of Brig. Gen. Phillips or any other officer representing the United States Government, and the sole subject of conversation during the conference was as to permission to cross the reservation and where the said spur track would run.

5. At this conference Gen. Phillips informed Mr. Thomason that he would detail Col. (afterwards Gen.) Cornelius Vanderbilt, the division engineer officer at Camp Wadsworth, to go over the ground with him and establish the location of the track.

6. At a later date Mr. Thomason met Col. (afterwards Gen.) Vanderbilt, and arranged with him the location of the line of this spur track.

#### DECISION.

1. The act of March 2, 1919, under which claimant must recover, if at all, prescribes that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, entered into with any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation.

2. In order that claimant may recover herein it must establish that it entered into an agreement under said act.

3. The evidence fails to disclose any such agreement; in fact, the evidence is to the contrary. Mr. Thomason, the only witness called on behalf of claimant, expressly stated that no promises or agreements were made by Gen. Phillips or Gen. Vanderbilt, or any other officer or agent representing the Government.

4. It is therefore the opinion of this Board that no agreement, either express or implied, was entered into between the claimant company and the United States Government.

5. For the foregoing reasons relief must be denied.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 12, 1920.

Case No. 2615.

*In re* CLAIM OF W. B. PRICE AND BEN F. VOGT.

1. **JURISDICTION.**—The Secretary of War has no jurisdiction to adjust a validly executed contract which has been terminated by performance, breach, or expiration of time for performance.
2. **SAME—DAMAGES.**—Under a validly executed contract for the purchase of waste material accruing at a cantonment during a certain period, this Board is without jurisdiction of a claim for unliquidated damages based upon alleged failure of the Government to turn over all such waste material. The case of Henry Knight & Sons, No. 1736, relied on by claimant, is distinguished because in that case after the dispute arose, the parties agreed that the Government would either segregate the disputed material or hold the money received therefor as a stakeholder, pending determination of the dispute.
3. **CLAIM AND DECISION.**—Claim presented under General Order 103, based upon a validly executed contract for waste material produced at Camp Taylor, Ky. Held, no jurisdiction.

Mr. Huidekoper writing the opinion of the Board.

This claim is filed under General Order 103, War Department, 1918. Claimants make a claim under a formal contract for waste material produced at Camp Taylor, Louisville, Ky., which the United States failed to deliver to them. Claimants further allege that in the event any of the said waste material has been sold that the United States pay to them the moneys derived from said sale. Claimants' demand is for an indefinite sum of money and an indefinite quantity of waste material.

FINDINGS OF FACT.

1. A formal contract was entered into between claimants and the United States, dated August 29, 1917, which expired June 30, 1918. By the terms of this agreement, contractors agreed to pay \$0.09 per month for each soldier and each person in Government service at Camp Taylor, during at least one half the month for which payment is made. In return for this payment contractors were to receive all waste material produced at Camp Taylor with certain exceptions mentioned in said contract. The contract provides:

“1. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags and bags, from Camp Taylor, Louisville, Ky.

"2. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation, to be designated by the commanding officer in charge. All manure is to be delivered by the United States to a point off or on the reservation selected or approved by the commanding officer in charge."

2. By petition filed with this Board on April 17, 1920, claimants allege that shortly after the contract was executed and after the contractors began performance a question arose as to the meaning in the first paragraph of the contract of the words "all waste matter of every kind and nature except rags and bags."

3. By said petition claimants further allege:

"4. In accordance with the terms of the contract, the contractor paid to the United States of America the sum of 9 cents per month for each soldier and each person in Government service at said camp during the entire period covered by said contract and demanded that there be delivered to said contractor waste materials, with the exception of rags and bags, as the same accumulated at said camp, but the United States of America and the commanding officer in charge at Camp Taylor and his subordinate officers each and all refused and failed to either deliver to said contractor or to permit it to receive and have large and substantial quantities of waste material of various and sundry kinds and descriptions other than rags and bags, and there accumulated, as pour petitioner is informed, believes, and charges, at Camp Taylor during the period covered by said contract, to wit, the period between August 29, 1917, and June 30, 1918, in addition to many other articles of waste material, the exact number of which is not within the knowledge of this petitioner, but is within the knowledge of the United States of America, the following specific articles of waste:

	In excess of—
Auto radiators.....	20
Barrels.....	500
Cases.....	500
Knives.....	25
Auto parts.....pounds	30,000
Baling wire.....do	50,000
Brass, including light yellow, red, heavy yellow, and turnings.....do	1,200
Composition.....do	750
Condemned oats, corn, and other foodstuffs.....do	5,000
Copper, light and heavy, and including wire, insulated and un-insulated.....pounds	800
Horseshoes.....do	5,000
Aluminum, all kinds.....do	600
Inner tubes, all kinds.....do	900
Iron, all kinds.....do	150,000
Leather, scrap, and miscellaneous.....do	2,000
Lead, all kinds.....do	800
Nails.....do	500
Roachings, mane and tail.....do	300
Rubber, exclusive of tires.....do	11,000
Steel, all kinds.....do	30,000
Stove plates and grates.....do	25,000
Tires, auto.....do	3,000
Tires, motor cycle.....do	1,300
Tubing, all kinds.....do	650

"The foregoing list of articles is an estimate, and the tabulation of articles is based upon the best information available to this petitioner, and it is believed that there accumulated at said camp during the period covered by the contract hereto attached in excess of the number of each article designated."

"6. \* \* \* that it [the claimant] is and at all times since the execution of the aforesaid contract was by the clear terms of the contract entitled to 'all waste matter of every kind and nature, except rags and bags,' which accumulated at Camp Taylor between August 29, 1917, and midnight of the 30th of June, 1918, now offers to accept in settlement of this controversy such articles of waste as accumulated at Camp Taylor during the period covered by said contract, if said articles are now in the possession of the United States of America, and in the event any or all of said articles have been disposed of, your petitioner, said contractor, offers to accept in lieu of such articles, if any, as may have been disposed of by the United States of America the amount received by the United States of America for such articles, if any, as may have been disposed of by the United States of America."

4. By letter dated May 24, 1920, John T. Geary, colonel, Quartermaster Corps, camp supply officer at Camp Taylor, states that he has caused a careful reading and thorough examination of all salvage records of activities at Camp Taylor during the months covered by this contract to be made and finds that claimants have no basis whatsoever on which to make a claim; that the records show that each and every organization carefully segregated its waste material which was collected at a designated place in strict accordance with the contract and that the contractors received and removed all of the waste material; that the contractors received all the waste material contracted for, and the records do not show a single sale of waste material during the term of the contract other than to claimants.

5. The contract in question expired on June 30, 1918, and it does not appear that claimants made any claim thereunder until they filed their present petition with the Board of Contract Adjustment on April 17, 1920, a period of about 22 months after the expiration of the contract. Although the petition recites a question of construction as to the meaning of paragraph 1 of the contract arose shortly after claimants commenced performance, it appears from the records of the camp supply officer at Camp Taylor that the contractors received all the waste material produced at said camp without making any protest. Assuming, however, claimants did protest they were not receiving all the waste matter called for by their contract, they accepted the quantity allotted to them by the Government officials and made the monthly payments required by said contract. There is also nothing to show but what the claimants acquiesced in the construction placed on the contract by the United States and accepted

the waste material in full satisfaction of said contract. The contract was fully performed and completed, both by the United States and claimants, without any question of doubt or dispute being left open by the parties for further determination.

Claimants' claim is for an indefinite sum of money and an indefinite quantity of waste material. In paragraph 6 of their petition quoted above claimants allege that in satisfaction of their claim they offer to accept in settlement such articles of waste material as accumulated at Camp Taylor during the period covered by the contract, if the articles are now in the possession of the United States, and in the event said articles have been disposed of, claimants offer to accept, in lieu thereof, the amount received for same. In his letter Col. Geary states that claimants have received all the waste material produced at Camp Taylor during the life of the contract, and that no other sale of any waste material was made during that time. The conclusion is inevitable that claimants received all the waste material to which they were entitled, and that their offer is of no avail.

6. By paragraph 4 of their petition above quoted the claimants allege upon information and belief that there accumulated between August 28, 1917, and June 30, 1918, many articles of waste material in excess of a specified amount, which in said petition is set forth, but said petition fails to show, and there is no proof in the record before this Board, that any of the articles therein enumerated were waste material. The very nature of the items named would not of itself suggest that said articles were waste material, and further action on the part of Government officials would be necessary before said property could be designated waste material. On August 29, 1917, the date of this contract, the sale of Government property used by the Army was regulated by section 1972 of the compiled statutes, which reads as follows:

"The President may cause to be sold any military stores which upon proper inspection and survey appear to be damaged and unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

The Secretary of War, by sections 678, 679, and 680 of the United States Army Regulations, prescribed the manner in which sale of public property shall be made, and the regulations require that a survey be made and the property condemned before being sold. It has been held that there is no authority to sell or dispose of Government-owned material until the required procedure, above mentioned, is had.



## DECISION.

1. Claimants in their petition refer to and rely upon the decision of this Board in the claim of Henry Knight & Sons (Inc.), No. 150-C-1736, but the facts set forth in that case are entirely different from the ones here presented. In the Knight case it appears that the claimant and the Government officials were in doubt as to the meaning of the clause "all waste matter of every kind and nature, except rags, bags, manure, and cinders." Pending a construction of said clause, such waste matter was, with the consent of the claimant, either segregated or sold and the money realized on the sale was held by the Government as a stakeholder, with the consent of the claimant, pending a construction of the clause, and thus the amount became liquidated, or where the material was segregated the Government also held possession of the waste material, pending the determination. The only question presented in that claim was one of construction of a formal contract and when that was determined the Government was in a position to either deliver the money or the waste material to the claimant.

2. In this case no such proceeding was taken and the record fails to disclose that the Government holds any money or waste material pending the construction of said clause. If the Government had withheld or sold any of the waste material herein claimed it is not alleged to have done so with the consent of this claimant. The amount claimed is wholly undetermined. If the Government failed and refused to deliver to claimants all the waste material called for by the contract, claimants would have a cause of action against the Government for breach of contract in which action claimants could recover all the damages they sustained. Of such a claim we have no jurisdiction.

3. The record in this case shows that the contract out of which the claim arises was a formal contract executed in accordance with the law, which has been fully completed by the parties and has expired by its own limitation. If claimants have sustained any damages, the Secretary of War is without jurisdiction to adjust the contract or make a supplemental agreement, and the claimants' remedy, if any, is to resort to the court having jurisdiction of such claim.

## DISPOSITION.

A final order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.

JUNE 12, 1920.

**Case No. 2614.**

*In re* **CLAIM OF GENERAL MANUFACTURING CO.**

1. **JURISDICTION.**—Where a formal contract has been fully performed, or has expired by its own limitation, the Secretary of War has no jurisdiction to adjust such contract, or to make a supplemental agreement thereunder.
2. **CLAIM AND DECISION.**—Claim for an amount not named under General Order 103 for damages for breach of contract by the Government to receive waste material. Held, Secretary of War has no jurisdiction.

Mr. Huidekoper writing the opinion of the Board.

This claim arises under General Order 103, War Department, 1918. Claimant makes a claim under a formal contract for waste materials produced at Camp Meade, Annapolis Junction, Md., which the United States failed to deliver to it. The claimant further alleges that in the event any of said waste material has been sold, the United States pay to it the money derived from said sale. Claimant makes demand for an indefinite sum of money and indefinite quantity of waste material.

**FINDINGS OF FACT.**

1. A formal contract was entered into between claimant and the United States, dated August 28, 1917, which expired June 30, 1918. By the terms of this agreement the contractor agreed to pay 5 cents per month for each soldier and each person in Government service at Camp Meade during at least one-half the month for which payment is made. In return for this payment the contractor was to receive all waste material produced at Camp Meade, with certain exceptions mentioned in said contract. The contract further provides:

“1. The contractor agrees to purchase and remove all waste matter of every kind and nature except rags, bags, manure, and cinders from Camp Meade, Annapolis Junction, Md.

“2. All such waste matter produced at Camp Meade shall be collected by the United States in its own receptacles and delivered to the contractor at such point within the reservation to be designated by the commanding officer in charge.”

2. By petition filed with this Board on April 17, 1920, claimant alleges that shortly after the contract was executed and after the con-

tractor began performance a question arose as to the meaning in the first paragraph of the contract of the words:

"All waste matter of every kind and nature, except rags, bags, manure, and cinders."

3. By said petition claimant further alleges:

"4. In accordance with the terms of the contract the contractor paid to the United States of America the sum of 5 cents per month for each soldier and each person in Government service at said camp during the entire period covered by said contract, and demanded that there be delivered to said contractor waste materials, with the exception of rags, bags, manure, and cinders, as the same accumulated at said camp, but the United States of America and the commanding officer in charge at Camp Meade, and his subordinate officers, each and all refused and failed to either deliver to said contractor or to permit it to receive and have large and substantial quantities of waste material of various and sundry kinds and descriptions, other than rags, bags, manure, and cinders, and there accumulated, as your petitioner is informed, believes, and charges, at Camp Meade during the period covered by said contract, to wit, the period between August 28, 1917, and June 30, 1918, in addition to many other articles of waste material, the exact number of which is not within the knowledge of this petitioner, but it is within the knowledge of the United States of America, the following specific articles of waste:

	In excess of—
Auto radiators.....	30
Barrels.....	500
Cases.....	500
Knives.....	25
Auto parts.....pounds	50,000
Baling wire.....do	75,000
Brass, including light yellow, red, heavy yellow, and turnings.....do	1,500
Composition.....do	1,000
Condemned oats, corn, and other foodstuffs.....do	75,000
Copper, light and heavy, and including wire, insulated and uninsulated.....pounds	1,200
Horseshoes.....do	8,000
Hose.....do	1,000
Aluminum, all kinds.....do	1,000
Inner tubes, all kinds.....do	1,000
Iron, all kinds.....do	250,000
Leather, scrap, and miscellaneous.....do	3,000
Lead of all kinds.....do	1,000
Nails.....do	500
Roachings, mane and tail.....do	750
Rubber, exclusive of tires.....do	15,000
Steel, all kinds.....do	100,000
Stove plates and grates.....do	50,000
Tires, auto.....do	5,000
Tires, motor cycle.....do	2,000
Tubing of all kinds.....do	1,000

"6. \* \* \* that it [the claimant] is and at all times since the execution of the aforesaid contract was, by the clear terms of the contract, entitled to 'all waste matter of every kind and nature, except rags, bags, manure, and cinders' which accumulated at Camp Meade, between August 28, 1917, and midnight of the 30th of June, 1918, now offers to accept in settlement of this controversy such arti-

cles of waste as accumulated at Camp Meade during the period covered by said contract, if said articles are now in the possession of the United States of America; and in the event any or all of said articles have been disposed of, your petitioner, said contractor, General Manufacturing Co., offers to accept in lieu of such articles, if any, as may have been disposed of by the United States of America the amount received for such articles, if any, as may have been disposed of by the United States of America."

4. By letter dated May 20, 1920, Marshall MacGruder, lieutenant colonel, Quartermaster Corps, states that a search of the files of the commanding officer and his subordinate officers at Camp Meade failed to give any evidence or show that the contractor had ever requested any of the waste material it is now claiming compensation for in its claim; that the subject matter of this claim never arose between contractor and the officers in command at Camp Meade and that there has been no controversy or dispute over the construction of said contract.

5. By letter dated May 24, 1920, R. E. Fisher, lieutenant colonel Infantry, United States Army, executive officer at Camp Meade, states:

"So far as these headquarters can discover there has been no failure on the part of camp authorities to live up to the contract mentioned and no evidence is available to show the accumulation of any waste material during the life of the contract which was not turned over to the contractors."

6. The contract in question expired on June 30, 1918, and it does not appear that claimant made any claim thereunder until it filed its petition with the Board of Contract Adjustment, April 17, 1920, a period of about 22 months after the expiration of the contract. Although the petition recites that a question of construction as to the meaning of paragraph 1 of the contract arose shortly after the claimant commenced performance, it appears from the files of the commanding officer at Camp Meade that no letters were received or record made of any such protest. Assuming, however, claimant did protest it was not receiving all the waste material called for by this contract, it accepted the quantity allotted to it by the Government officials and paid the monthly payments required by said contract. There is also nothing to show that during the performance of this contract but what the claimant acquiesced in the construction placed on the contract by the United States and accepted the waste material and made the payment in accordance therewith. The contract was fully performed and completed both by the United States and claimant, without any question of doubt or dispute being left open by the parties for future determination.

Claimant makes its claim for an indefinite sum of money and an indefinite quantity of waste material. In paragraph 6 of its petition

above quoted claimant alleges that in satisfaction of its said claim it offers to accept in settlement such articles of waste material as accumulated at Camp Meade during the period covered by the contract, if the articles are now in the possession of the United States, and in the event said articles have been disposed of claimant offers to accept in lieu thereof the amount received for same. The letter of Lieut. Col. Fisher states that there is no evidence available to show the accumulation of any waste material during the life of the contract which was not turned over to the contractor. The conclusion is inevitable that claimant received all the waste material to which it was entitled—that its offer is of no avail.

7. Claimant by paragraph 4 of its petition above quoted alleges, upon information and belief, that there accumulated between August 28, 1917, and June 30, 1918, many articles of waste material in excess of a specified amount which in said petition is set forth, but said petition fails to show and there is no proof in the record before this Board that any of the articles therein enumerated were waste materials. The very nature of the items named would not of itself suggest that said articles were waste material, and further action on the part of the Government officials would be necessary before said property could be designated waste material. On August 28, 1917, the date of this contract, the sale of Government property used by the Army was regulated by section 1972 of the Compiled Statutes, which reads as follows:

“The President may cause to be sold any military stores which upon proper inspection or survey appear to be damaged or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War and the sales shall be made under regulations prescribed by him.”

The Secretary of War, by sections 678, 679, and 680 of the United States Army Regulations, prescribed the manner in which sales of public property shall be made and these regulations require that a survey be made and the property condemned before being sold. It has been held that there is no authority to sell or dispose of Government-owned material until the required procedure, above mentioned, is had.

#### DECISION.

1. Claimant in its petition refers to and relies upon the decision of this Board in the claim of Henry Knight & Son (Inc.), No. 150-C-1736, but the facts set forth in that case are essentially different from the ones here presented. In the Knight case it appears that claimant and the Government officials were in doubt as to the meaning of the clause, “all waste matter of every kind and nature except

bags, bags, manure, and cinders," and that pending a construction of said clause certain waste matter was, with the consent of the claimant, either segregated or sold and the money realized on the sale was held by the Government as a stakeholder with the consent of the claimant, pending a construction of said clause, and thus the amount became liquidated; or where the material was segregated the Government also held possession of the waste material pending the determination. The only question presented in that claim was one of construction of a formal contract, and when that was determined the Government was in a position to either deliver the money or the waste material to the claimant.

2. In this case no such proceeding was taken and the record fails to disclose that the Government holds any money or waste material pending the construction of said clause. If the Government has withheld or sold any of the waste material here claimed it is not alleged to have done so with the consent of this claimant. The amount here claimed is wholly undetermined. If the Government failed and refused to deliver to claimant all the waste material called for by its contract claimant would have a cause of action against the Government for a breach of contract in which action claimant could recover all the damages it sustained. Of such a claim we have no jurisdiction.

3. The record in this case shows that the agreement out of which the claim arises was a formal contract executed in accordance with the law, which has been fully performed by the parties and has expired by its own limitation. The Secretary of War is, therefore, without jurisdiction to adjust such contract or make a supplemental agreement and the claimant's remedy, if any, is by resort to a court having jurisdiction.

#### DISPOSITION.

A final order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.



JUNE 12, 1920.

**Claim No. 65.**

*In re* **CLAIM OF F. BENITEZ REXACH (REHEARING).**

1. **CONTRACT—CHANGE.**—Where the claimant had a contract with a municipality in Porto Rico for the construction of a road, the plan of which was changed at the suggestion of United States officers, with the consent of the claimant, and an army officer was designated as constructing engineer by the municipality and made subsequent changes in the plans, which diminished the work and claimant's compensation, there was no contractual relation with the United States and no liability for such changes.
2. **CLAIM AND DECISION.**—Claim under General Order 103 for \$3,393 lost profits. Held, claimant not entitled to recover.

Maj. Blackburn writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is a claim presented under War Department General Order No. 103, 1918, and comes up on petition for rehearing filed by the claimant subsequent to a decision by this Board (Vol. 1, p. 193, these decisions) on an appeal from the decision of the officer in charge of construction at Camp Las Casas, San Juan, P. R., under which the claimant was deprived of prospective profits amounting to \$3,393 by reason of the elimination, by the constructing quartermaster, at Camp Las Casas, of certain work in connection with the above-named camp. It is convenient to restate the facts:

2. In 1917 the United States contemplated the establishment of a cantonment in Porto Rico. The city of San Juan appropriated \$300,000 for the purpose of improving certain lands as a camp site, and the construction of a roadway from the city of San Juan to the proposed site of the cantonment. Thereafter this proposed cantonment site was recommended to the United States Government. The municipality of San Juan entered into a contract with the claimant for the construction of a road to connect the site of the proposed cantonment with the main highway. The city of San Juan was to pay to the contractor the sum of \$22,482 for this road, which was to be constructed in accordance with the specifications as shown on certain plans and maps prepared by the city engineer of the city of San Juan.



3. The method generally followed in Porto Rico in letting contracts for public work is, briefly, as follows: The project is divided into convenient units of work, and the amount of the accepted bid is apportioned to the various units of the project by the contracting authority. This is done according to his own view of the proper ratio which each unit bears to the entire project. The contractor, under this method of procedure, has no opportunity to control the apportionment of his lump-sum bid among the several units, and as a result, with reference to his profits, the contractor must view the entire project as one unit. In the present instance the project was divided into seven distinct units, as follows:

1. 2,996 cubic meters of unclassified excavations including the formation of grading, at 60 cents-----	\$1, 797. 60
2. 5,068 cubic meters of excavations in borrows for fills, at \$1.25----	6, 335. 00
3. 300 cubic meters of excavations in ditches and drains, at \$1-----	300. 00
4. 112 linear meters concrete pipes, 0.6 meter inside diameter, including excavations and dry masonry for foundations, at \$7-----	784. 00
5. 14 meters, 1-meter span concrete culverts (finished work), at \$9 (5 inches in thickness)-----	126. 00
6. 14 meters, 0.75-meter span reinforced concrete at junction with main road, at \$10-----	140. 00
7. 13,500 square meters of macadam, 0.25 meter in thickness, including box, etc., finished work, at \$1-----	13, 500. 00
Contracting estimate -----	22, 982. 00
Inspection -----	500. 00
Total-----	23, 482. 00

4. After the contract between the city of San Juan and the claimant had been executed, the mayor and city engineer of San Juan came to Washington to lay the matter before the War Department, with the view of securing the War Department's approval of the proposed cantonment site. The plans and specifications which had theretofore been prepared by the city engineer of San Juan were laid before the proper officials of the War Department in Washington, and after an inspection of these plans was had it was agreed between the War Department and the representatives of San Juan that no work should be begun upon the proposed roadway until the War Department had first had the opportunity to send its engineers to Porto Rico to view the ground, and for the further purpose of ascertaining whether or not the route of the proposed roadway was the most practicable. Capt. Ernest C. Steward, Engineer Corps, National Army, was sent to San Juan as constructing quartermaster for the proposed Camp Las Casas. Upon the arrival of Capt. Steward, and after an inspection of the proposed route, he decided that the requirements of the camp demanded that the route and character of the road be changed. These proposed changes were submitted to the municipal council of San Juan. Accordingly certain changes were made in the plans and specifications by which the road was widened from 19.68 to 27 feet. An arrangement was had between Capt. Steward, con-

structing quartermaster, and the municipality of San Juan whereby he would supervise and direct the work on the proposed roadway. The arrangement further provided that the city of San Juan was to contribute toward the construction of this road \$22,985, and that in the event that any further changes were necessary which would involve the expenditure of a greater sum than this it would be assumed and paid by the United States. These arrangements were effected by resolution of the municipal council of San Juan on February 28, 1918, and the proposed changes in the road suggested by Capt. Steward, constructing quartermaster, were ratified, and the contract which had theretofore been awarded to the claimant was reaffirmed. The resolution affirmed the previous offer of the city of San Juan to contribute toward the construction of this road \$22,985, and further stated that the United States would pay any cost above that sum which might be incurred in the construction of the road due to changes or increases in the work directed by the constructing quartermaster. Copies of this resolution were sent to both claimant and the constructing quartermaster. Thereafter a conference agreement between the claimant and Capt. Steward, constructing quartermaster, was entered into. This agreement is as follows:

Conference memorandum between Capt. E. C. Steward, constructing quartermaster, and F. Benitez Rexach, road constructor, regarding municipal contract for highway upon site of Camp Las Casas.

Whereas the city of San Juan proposed to build a certain highway covered by plans and specifications already prepared for the purpose of serving Camp Las Casas; and

Whereas F. Benitez Rexach was the low bidder upon said work, specifying certain prices to be paid for said work based upon certain specified units of work to be done; and

Whereas the requirements of Camp Las Casas demand a greater quantity of road work than was proposed in the plans and specifications prepared by the city of San Juan, it is agreed that the following arrangements will be satisfactory to Capt. E. C. Steward, constructing quartermaster in charge of the construction of Camp Las Casas, and contractor Rexach, aforesaid:

1. That the work to be done shall be in accordance with the plans and specifications to be prepared by the constructing quartermaster and shall be supervised by him, but said plans shall conform to the plans and specifications prepared by the city of San Juan, except as to the location and width of the highway and the cross sections of the grading.

2. That the contractor will perform the same number of units of work measured in square meters of surface, cubic meters of grading of the various classes, and other units of work as were called for in the plans and specifications prepared by the city of San Juan, under which the contractor's bid was made, and when said specified number of units of work have been performed then the contract shall terminate.

3. It is further agreed that the maintenance clause in the specifications prepared by the city of San Juan shall not apply to any road work upon the camp site of Camp Las Casas, namely, in roads lying easterly from the westerly line of Calle Jazmin produced northerly and southerly.

ERNEST C. STEWARD,  
*Major, Engineer Corps, National Army,*  
*Constructing Quartermaster.*  
 F. BENITEZ REXACH,  
*Contractor.*

Certified a true and correct copy.

F. BENITEZ REXACH, *Contractor.*

5. After the work was begun the constructing quartermaster again made changes in the route of the road and character of the work, whereby item 2, to wit, "5,068 cubic meters of excavations in borrows for fills (at \$1.25), \$6,335," was eliminated from the work. The work performed by the contractor after the elimination of unit 2 is as follows:

1. 6,474 cubic meters of unclassified excavations including the formation of grading, at 60 cents-----	\$3, 884. 40
2. None.	
3. 533 cubic meters of excavations in ditches and drains, at \$1-----	533. 00
4. 65.41 concrete pipes 0.6 meter, inside diameter, etc., at \$7-----	457. 80
5. None.	
6. 0.75 meter span reinforced concrete culverts, etc., 50.99, at \$10-----	509. 90
7. Macadam 0.25 meter in thickness, including box, etc., 17,599.9, at \$1-----	17,599. 90

6. After the elimination of item 2, the constructing quartermaster proceeded with the completion of the road to the camp, the cost of which was paid by the United States. The United States employed the claimant to complete the work, and he was paid for this additional service by the day.

7. The contention of the claimant is that the elimination of that portion of the work which was designated as item 2, resulted in a loss of profit to him of 80 per cent of the contract price of this item, which amounted to \$3,393, and which is now the basis of this claim.

#### DECISION.

1. The case at bar was first decided by this Board upon the theory that there was in existence a contract between the claimant and the United States Government, but that the work performed and the amount of money received by the contractor had not been decreased by the contract, and that the claimant had failed to show a loss of profit on the whole transaction. No evidence was introduced at the former hearing, either upon behalf of the Government or of the claimant, and the decision was based upon the papers, letters, and exhibits in the file. The present decision is not in anywise a modification of the former decision of the Board.

2. The contract between the city of San Juan and the claimant was entered into prior to the time of the arrival of the constructing quartermaster. The changes in the route of the road and in the character of the work to be done under the contract between claimant and the municipality of San Juan were made with the knowledge, consent, and full understanding of the claimant. There is nothing in the record which indicates that the municipality of San Juan at any time relinquished its control over this contract or terminated its contractual relationship with the claimant. Whatever changes or diminution may have been made in this work were accomplished by the municipality, acting through the constructing quartermaster. The claimant, at all times, looked to the city of San Juan for payment for the work performed. The conference agreement between Capt. Steward, constructing quartermaster, and the claimant in no wise changed the terms of the original agreement. To our minds, this agreement was made for the purpose of reducing to writing *the understanding existing between the claimant, the city of San Juan, and the constructing quartermaster, whereby the claimant expressed his willingness to accept Capt. Steward, constructing quartermaster as supervising engineer for the city of San Juan.* The testimony of Capt. Steward is clear and uncontradicted and is to the effect that after he accepted the authority from the municipality of San Juan to supervise the construction of this road, he acted throughout the entire transaction in the capacity of a supervising engineer for the city of San Juan.

3. While we do not undertake to adjudicate the rights of the parties under the original contract between the claimant and the city of San Juan, nor do we attempt to construe the contract laws of Porto Rico, yet we are of the opinion that whatever may be the resultant losses, if any, occasioned by the diminution of the work originally contracted for, by the elimination of item 2 therefrom, are chargeable against the city of San Juan, and not to the United States.

4. We hold that the transaction between the claimant and Capt. Steward, constructing quartermaster, fails to establish an agreement between the claimant, Rexach, and the United States. In this respect our decision differs from the former decision of this Board.

5. There is no liability upon the part of the United States to reimburse the claimant for his losses, if any, sustained. For the foregoing reasons, the relief prayed for is denied.

#### DISPOSITION.

The Board of Contract Adjustment will enter a final order denying relief.

Col. Delafield and Mr. Marcum concurring.

**JUNE 12, 1920.**

**Case No. 2739.**

*In re* **CLAIM OF W. N. AND S. P. BURNS.**

- 1. DATE OF FILING CLAIM.**—This Board is without jurisdiction of a claim under the act of March 2, 1919, first presented to an agency of the Government on May 21, 1920.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$897.63, based upon an alleged agreement in relation to wool. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, dated March 26, 1919, for \$897.63, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Claimant alleges that on June 12, 1918, it delivered 5,578 pounds of fine wool to H. P. Roddie & Co., of Brady, Tex., agents of Charles J. Webb & Co., of Philadelphia, Pa.; that this wool was delivered for the use of the Government in accordance with the terms of the Government regulations for handling the wool clip of 1918 as established by the Wool Division, War Industries Board, May 21, 1918; that claimant was advised by a representative of Charles J. Webb & Co. at the time of shipment that this wool should bring at least 65 cents per pound; that similar wool sold for 65 cents per pound "in the grease" in July, 1917; that under the Government regulations claimant should have received 65 cents per pound for this wool, but that it was paid only \$2,728.07; and that, by reason of improper grading, there is due it the sum of \$897.63.

3. Claimant has furnished an affidavit in which it states that "no presentation of this claim was made prior to May 21, 1920." The claim was first presented to the Board of Contract Adjustment May 21, 1920, after which date this Board requested claimant to furnish evidence showing a previous presentation of this claim to the Government. It was in compliance with this Board's request for infor-

mation concerning a previous presentation of the claim that claimant furnished the affidavit just mentioned.

DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which is in such cases the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.



JUNE 12, 1920.

Case No. 2733.

*In re* CLAIM OF ATLANTIC COAST LINE RAILROAD.

1. **IMPLIED CONTRACT—COMPENSATION—REASONABLE VALUE OF SERVICES RENDERED.**—Where claimant, in response to a telegram from an officer connected with the operation of the Air Service Railway stating that an engine on their railroad had turned turtle and requested claimant to send its wrecking crews, with which claimant complied, there arose under the circumstances in the case an implied contract within the purview of the act of March 2, 1919, which obligated the Government to pay claimant the fair and reasonable value of its services therein rendered.
2. **CLAIM AND DECISION.**—This claim for \$218.70 arises under the act of March 2, 1919, under an alleged implied contract. Held, claimant is entitled to the relief sought.

Maj. O'Neill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular 17, 1919, for \$218.70, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. During the month of October, 1918, the Air Service was operating a short line of railroad known as the Florida Air Service Railway. On the 11th of October, 1918, an engine operated by the Air Service Railway turned turtle, blocking the line and suspending all traffic. Lieut. Norman Lawson, connected with the operation of the Air Service Railway, thereupon telegraphed to J. F. Council, superintendent of the Atlantic Coast Line Railroad as follows:

“Engine turned turtle over mile post 3. No one killed. Send engine and wrecking crew.

“LAWSON 247-P.”

In response to this telegram the claimant sent a wrecker, equipped and manned, and replaced the locomotive on the rails. Claim is now submitted for the sum of \$218.70 claimed to be the fair and reasonable value of the services rendered.



**DECISION.**

The telegram above quoted and the response thereto by the claimant, implied a contract between the United States and the claimant to pay the claimant the fair and reasonable value of the services rendered.

**DISPOSITION.**

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular 17, Purchase, Storage, and Traffic Division, 1919.

Col. Delafield and Mr. Low concurring.

JUNE 14, 1920.

Case No. 2720.

*In re* CLAIM OF W. H. VAUGHN.

1. JURISDICTION.—Where a claim under the act of March 2, 1919, is not presented to or filed with any department or officer of the Government until after June 30, 1919, there was no authority in the Secretary of War, or the Board of Contract Adjustment, to make settlement or adjustment of said claim.
2. CLAIM AND DECISION.—Claim under the act of March 2, 1919, for \$858.80, balance due on wool. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. W. H. Vaughn, of Lubbock, Tex., has filed this claim, amounting to \$858.80, under the act of March 2, 1919. Statement of claim, Form B, has been presented under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. It appears that claimant shipped from Abernathy, Tex., to S. Silberman & Sons, Chicago, Ill., 4,294 pounds of lamb's wool, on or about June 29, 1918. Claimant's petition reads in part as follows:

"Claimant \* \* \* was to receive the customary and prevailing price for the kind of wool furnished by him, same being lamb's wool, and of the ordinary and customary grade and quality. Such statement and representations were made to claimant by Nick Jordan, of Plainview, Tex., who was acting as Government agent in the premises, or claimed to be so acting, and authorized to make said contract. Instead of receiving the customary and prevailing price for lamb's wool this claimant only received a net amount of \$1,711.26 in payment for 4,294 pounds of lamb's wool, which was less than 40 cents per pound net to claimant. \* \* \* And claimant further states that said wool was improperly graded, \* \* \* and he makes a claim therefor, based upon the difference that he received and the price he should have received, amounting to at least 60 cents per pound, or a difference of 20 cents between the price received and that which should have been had. Based upon these figures your applicant claims that he is entitled to at least \$858.80 herein, under the act of Congress approved March 2, 1919."

3. The statement of claim reached this Board May 21, 1920. When claimant was requested to furnish evidence concerning a previous presentation of the claim to any department, official, or agent of the Government, he forwarded an affidavit in which he says:

"That this claim was first presented by affiant to any Government department or agent of the United States on April 4, 1920, through a letter addressed to the Secretary of Agriculture by J. E. Vickers, attorney, Lubbock, Tex., representing affiant.

"That said letter of April 4, 1920, addressed to the Secretary of Agriculture, represents the first presentation of this claim by affiant in any manner against the United States Government."

#### DECISION.

1. It is neither necessary nor proper for the Board of Contract Adjustment to express any opinion concerning the alleged improper grading of the wool or the failure of the Government or claimant's consignee to pay claimant the amount alleged to be due, in view of the fact that this claim was not presented to the Government within the presentation period fixed by law.

2. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply

with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Capt. Powell concurring.

JUNE 14, 1920.

**Case No. 2135.**

***In re* CLAIM OF GILSONITE CONSTRUCTION CO.**

- 1. ADDITIONAL WORK—FEE OF CONTRACTOR.**—Where a contractor who has a cost-plus contract performed additional work which the contracting officer had no right to call for under the terms of the contract, there arose an implied agreement within the meaning of the act of March 2, 1919, whereby the Government became obligated to pay claimant a fee for such additional work. (J. G. White Engineering Corporation, No. 1895.)
- 2. CLAIM AND DECISION.**—Claim for \$11,465.68, part of which arises under the act of March 2, 1919, and part under the provisions of a formally executed contract for the construction of an aviation training school. Held, claimant is entitled to relief under the act of March 2, 1919. Held also, that claimant is entitled to recover some of the items of the claim presented under General Order 103; others disallowed.

Maj. Blackburn writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Certain items are included in the claim, however, which are to be considered under War Department General Order No. 103, 1918. Statement of claim on Form A under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$29,309.60, was received by G. I. Rowley, captain, Air Service (Aircraft Production), June 30, 1919, and was transmitted by the Air Service Claims Board on October 8, 1919, to this Board for consideration and action. The sum of \$17,843.92 has been paid claimant since the filing of the claim, leaving a balance of \$11,465.68 now alleged to be due. A hearing was conducted by the War Department Board of Contract Adjustment, April 22, 1920. The facts relating to that part of the claim arising under the act of March 2, 1919, and those relating to that part of the claim arising under General Order 103, 1918, will be included herein.

2. The circumstances out of which the claim under the act of March 2, 1919, arises, are as follows:

Under date of August 24, 1917, the claimant, the Gilsonite Construction Co., entered into a formal contract (order No. 10164) with

the United States Government, through Capt. C. G. Edgar, Signal Corps, contracting officer, for the performance upon what is commonly called a "cost-plus basis" of certain construction work, at Call field, Wichita Falls, Tex., described as follows:

"One two-squadron aviation training school in the vicinity of Wichita Falls, Tex., including erection of buildings, preparation of grounds, roads, light, heat, sewerage, etc."

The work was to be done according to certain plans and specifications attached to and forming a part of said contract, with the right of the contracting officer to call for such changes in the plans and specifications, and for such additional work as was necessary and incidental to the completion of the work under the terms of the written contract and in accordance with the general plans. Said contract is on the form the printed part of which is similar to the contract involved in the case of the J. G. White Engineering Corporation, No. 1895, before the War Department Board of Contract adjustment.

3. In due time the claimant commenced work under said formal contract, and while this work was underway and on or about May 18, 1918, an informal agreement was entered into between claimant and the Government of the United States through Capt. C. G. Edgar, Signal Corps, by which claimant undertook to perform, and did perform, certain additional work at Call field, Wichita Falls, Tex., which was not contemplated in nor embraced within the terms of said written contract of August 24, 1917, and which the contracting officer had no right to call for under the terms of said contract. The Government has paid the cost of said additional work, including labor, materials, etc., and the only interest claimant had therein was the fee which it was entitled to receive based upon a sliding scale of allowances or percentages to be determined by the cost of the work as set out in the original written contract.

4. On December 12, 1918, after the additional work had been performed, a supplemental agreement between claimant and the Government was entered into, in which the formal contract of August 24, 1917, is referred to, and in which it is stipulated that claimant had been required to perform additional work at a cost in excess of the work contemplated in the original contract. It was further stipulated in said supplemental contract that the maximum fee which might be allowed claimant should be increased from \$70,000, as set out in the original contract, to \$79,200. The items of the claim which properly come under General Order 103, War Department, 1918, and the facts relating to same, will each be treated under "Decision" hereinafter.

## DECISION.

## CLAIM UNDER ACT OF MARCH 2, 1919.

1. The changes in the plans and specifications, and the right of the contracting officer to call for the additional work referred to and authorized in the original contract between claimant and the Government, has been held by this Board, in a case in which the facts were similar to those here involved, to mean and embrace only such changes and incidental and necessary work as might be found essential to the completion of the work in accordance with the general plan. Any additional work, therefore, involving a radical departure from that originally contemplated by the parties, as set out in the plans and specifications, would necessarily call for an additional undertaking other than that which was in the minds of the parties at the time of entering into the original formal contract.

2. The contracts and facts in the case of the J. G. White Engineering Corporation, No. 1895, are practically on all fours with the contracts and facts in the instant case, the names of the parties and locations, of course, being different. In that case, this Board has stated the rule in general terms relative to the right of the contracting officer to call for additional work to be as follows:

“The contracting officer had no right under the terms of the written contract to call for additional buildings; or substantial additions to buildings already completed or partially completed by the petitioner in accordance with the original plans and specifications; or the conversion or rebuilding of any buildings which were completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractor; or the building, erection, or construction of necessary electrical equipment, railroads, roads, waterways, sewers, or fencing occasioned by the erection of such additional buildings not embraced in the plans and specifications under the original contract; or the rebuilding or conversion of buildings completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractors; nor for the maintenance of buildings already constructed under the terms of the written contract or under any agreement independent of the written contract; where such additional work embraces additional cost not to be compensated for under any provision of the written contract.”

3. As a result of the informal agreement entered into between the Gilsonite Construction Co. and the United States on or about May 18, 1918, under which certain additional work not contemplated in the original contract was performed by the Gilsonite Construction Co., an obligation on the part of the United States arose to pay the said Gilsonite Construction Co. a fee for all such additional work as hereinabove limited and defined, which the contracting officer had



no right to call for under the terms of the written contract of August 24, 1917, which was done by the said Gilsonite Construction Co., at Call field, Tex., in compliance with orders received from the Construction Division of the Signal Corps, or which has been accepted and received by the United States. The method of ascertaining such fee has been stated by this Board as follows:

“The contractor being settled with for work done under the original contract and strictly in conformity with the terms thereof, the cost of such additional work should be added to the cost of the work done under the original contract, and the appropriate percentage ascertained by this total from the schedule of percentages and this percentage applied to the cost of the additional work, subject to any other provisions of the contract with respect to the modification of such percentage.”

4. The so-called supplemental contract of December 12, 1918, entered into between the Gilsonite Construction Co. and the Government, in and by the terms of which the parties undertook to increase the maximum fee set out in the original contract of August 24, 1917, from \$70,000 to \$79,200, is inoperative and void for the want of consideration, in that additional work had been performed at the time of making said supplemental agreement, and further, because it appears that the parties acted on the assumption that the additional work for which the additional fee contemplated by said supplemental agreement was to be paid was such work as the contracting officer had a right to call for under the terms of the original contract. Obviously, if the contracting officer had a right to call for and require the additional work for which a fee is now claimed by the Gilsonite Construction Co. under the terms of the original contract, it follows as a matter of course that no fee for such additional work could properly be allowed.

5. It is manifest that it was understood between the parties at the time of and during the performance of the additional work that the rights of both the Government and claimant should be governed and determined by provisions identical with those contained in the written contract of August 24, 1917, and that the fee to be allowed claimant for the additional work should be ascertained by the same method as prescribed in the original contract for fixing the fee of the contractor, viz, schedule of percentages and allowances for the total work done at Call field, but not as to such additional work subject to any clause limiting the possible fee.

CLAIM UNDER GENERAL ORDER 103, WAR DEPARTMENT, 1918.

*Item 1.*—The sum of \$4,462.76 has been submitted as a sum incurred and paid by the claimant for the services and expenses of a Mr. Richardson, an expert accountant, in supervising the claimant's accounts during the period of construction.

There is some conflict in the evidence as to how and why Mr. Richardson came to Call field and engaged in his work. The Board, however, is of the opinion that the weight of the evidence tends to support the view of Mr. John McInerney, who was at the time, superintendent of construction for the United States Signal Corps at Call field, Wichita Falls, Tex. Mr. McInerney testified before the Board that Mr. Richardson came on the job about the 1st of September, 1917. He testified further:

"Now, as I understood at that time, Mr. Richardson came there to look after the contractor's interests and to install a system of accounting and time keeping \* \* \*. Now, as I understood, that arrangement for Mr. Richardson's presence on the job, that he was going to look after the Gilsonite Construction Co.'s interests. There was no claim made for any salary or traveling expenses or for anything in connection with Mr. Richardson's employment.

"Mr. BOWERS. When you say there was no claim made, what do you mean exactly by that?

"Mr. McINERNEY. I mean that this Mr. Richardson was not placed upon the pay roll. It was not understood that he was an employee on the job. It was not understood that any of his services or expenses were to be charged to the Government.

"Maj. BLACKBURN. At whose request, Mr. McInerney, if you know, did Mr. Richardson go to that construction field, or where this work was going on?

"Mr. McINERNEY. He was not placed on the job at the request of anybody connected with the Government, Major. He was placed there, Mr. Heannie told me, to carry on the work as it should be carried on, and for the protection of the Gilsonite Co. and the Government. This man, Mr. Richardson, was an expert accountant."

(Mr. Heannie was an officer of claimant company.)

"Mr. BOWERS. You, of course, were representing the Government in all these matters concerning construction of this project up to the time you left?

"Mr. McINERNEY. Yes, sir.

"Mr. BOWERS. If he had been [referring to Mr. Richardson] there for the benefit of the Government, you, of course, would have known it?

"Mr. McINERNEY. Yes, sir.

"Mr. BOWERS. Then, otherwise, he must have been brought there at the request of the claimant?

"Mr. McINERNEY. Yes, sir. Mr. Bowers, let me qualify that in this way: That Mr. Richardson was brought there solely and entirely by the contractor, but he was a whole lot better and of a good deal more use to the Government than any man the contractor had on that work. We had absolutely no agreement that he should be an employee of the Gilsonite Construction Co. so far as the construction work at that field was concerned.

"Mr. BOWERS. And no arrangement to reimburse the contractor for his services?

"Mr. McINERNEY. Absolutely none; I understood all the time that he was looking after the contractor's interests.

"Maj. BLACKBURN. Did the claimant understand his attendance there in that way, too?"

"Mr. McINERNEY. Yes, sir."

It therefore appears very clearly that the services of Mr. Richardson were never intended to have been charged to the Government, nor was it the original intention, in procuring Mr. Richardson's services, to place him on the pay roll or consider the expenses as chargeable to the contract. This Board is, therefore, of the opinion that this item should be disallowed.

*Item 2.*—For rental of plows, scrapers, etc., \$484.50 paid by the contractor. This item is presented as a result of an action brought against the contractor for the rental of plows, scrapers, fresnos, and slips. It appears that claimant hired from a man named Anderson teams and wagons, including drivers; that in addition thereto Anderson furnished fresnos or slips, which are, respectively, light or heavy shovels or scoops, drawn by mules or horses, for removing earth. That Anderson insisted that he was entitled to compensation for the use of the fresnos or slips and that an action was subsequently brought for the sum of \$550, but was settled by the payment of \$484.50, by the contractor. It appears from the testimony that it was the local practice in the vicinity to allow the contractors a rental for such tools, and it also appears that the contractor was instructed by representatives of the Government to make such settlements as it could of any such actions which were pending. In the opinion of this Board this is an item properly chargeable under the contract, and that the claimant should be allowed this amount.

*Item 3.*—The sum of \$492.57, involved in the settlement of an action brought by Gidd Jones against the contractor as a result of a dispute in respect to wages. The claimant experienced difficulty in obtaining workmen in the vicinity of Wichita Falls, and as a result of this difficulty arranged to procure workmen from Fort Worth. Upon the arrival of the men at Wichita Falls a dispute arose as to the amount of their wages, as a result of which dispute an action was brought against the contractor, which action was settled by the payment of \$492.57 to the workmen. No work was done by these men in performance of the contract with the Government. A dispute arose before they actually performed any services, and the amount paid in settlement was not for services rendered. The Board is, therefore, of the opinion that this item is no part of the cost of the work and should, therefore, be disallowed.

*Item 4.*—This item represents deduction of \$775.89, from partial payment No. 87. The deduction was as a result of the payment of premiums by claimant for employers' liability and insurance. The premiums were based on the total amount of the pay roll and included

in the pay roll were sums paid for the rental of teams. The contractor had, for a considerable period of time, included such items, but it does not appear that such items were ever specifically approved by the contracting officer, but it does appear that they were allowed and passed by the Government auditors. Subsequently, however, word was received from the War Department at Washington to the effect that the premiums should be based upon compensation of the persons employed, exclusive of the amount paid for the rental of teams. Such amounts which had been allowed were thereupon deducted from partial payment No. 87 and an effort was made by the contractor to obtain a refund of these amounts from the insurance companies. The contractor failed in his effort to procure a refund from the Guardian Casualty & Guarantee Co., for the reason that the latter company, between the time of payment of premium and time of the request for refund, had become insolvent, and its assets liquidated for the benefit of creditors. It does not appear that this payment of premium was such as any reasonable business man should have made, more especially without the express assent of the contracting officer. It also appears that this contractor had conducted contracts similar to this one on previous occasions and should have been familiar with the ruling of the War Department on that point. The Board is, therefore, of the opinion that this item does not come properly under the contract as an item of cost, nor properly under subdivision H of article 2 of the contract as a bond or other insurance required by the contracting officer. This item should, therefore, be disallowed.

*Item 5.*—Fees and expenses paid by the contractor to Messrs. Carrington, Montgomery, and Britain, attorneys, for services rendered in respect to actions brought against contractor in Texas. The total fees amounted to \$526.45, and were paid by the contractor, and whether the claimant can recover depends solely on the construction of the contract. The nature of the claim is such that no recovery can be had for the attorneys' fees in question unless the Government in the contract expressly agreed to pay that. The contract does not, in terms, provide for the payment by the Government of the claimant's attorneys fees nor other collateral expenses arising out of occurrences during the time of performance of the Government contract. There is no reference whatsoever to such expenses in the contract unless it is found in subdivision H of article 2. This subdivision of the contract refers to such bonds, fire liability, and other insurance as a contracting officer may approve or require, and continues:

“\* \* \* and such losses and expenses not compensated by insurance or otherwise as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the con-

tractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor."

This clause is silent as to any expenses for legal services, and it is not contended on behalf of the claimant that these expenses were incurred with the written consent and approval of the contracting officer.

Subdivision H, section 2, of the contract can not be construed as agreeing to indemnify the claimant against any possible expenditure required of it for any purpose. The Board is of the opinion that this is not an item of cost contemplated by the contract and should be disallowed.

*Item 6.*—Item 6 represents the fee of 7 per cent which, under the contract, was the amount to be paid contractor on all items of cost. But it is expressly stipulated in paragraph (H) article 2 of the contract that "such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee." This eliminates this item as a proper charge against the contract and the same is disallowed.

*Item 7.*—This item is for a sum of money, which, it is understood, approximates \$5,000 and which counsel for claimant characterized as being "rather an indefinite one, and it is indefinite to-day." It represents the aggregate amount involved in 12 suits now pending against the claimant in the courts in the State of Texas which have been brought by former employees of contractor, the Gilsonite Construction Co. Certain laborers employed by the contractor were paid time and half time for all overtime work and double time on Sundays. This gave rise to the plaintiffs in the above suits demanding that they be paid on the same basis, which was refused by the contractor. These plaintiffs were employed on a weekly basis. Most of them were timekeepers, but a chauffeur, a lumber checker, a labor foreman, a draftsman, are also included. Upon the contractor refusing payment for the half time alleged to be due on overtime work the above-mentioned suits were instituted to recover same. The claimant defended against these suits under authority contained in a communication from the office of the Chief Signal Officer of the Army, Supply Division, auditing section, as follows:

"As regards any suits which have been brought by employees engaged on a weekly basis, you should defend these, if so advised to do by your attorneys, and if necessary Mr. McInerney will be sent to testify. It is obvious that where a weekly rate is employed and the employee informed of the number of hours his services are to be rendered that the number of hours was considered and the amount of wages agreed upon."

It was not seriously insisted by counsel for claimant at the hearing that it was within the province of this Board to adjudicate at this

time any specific amount as covering this item of the claim, for the very potent reason that there is no way of determining what, if any, will be the liability of the contractor as the result of such suits. No allowance for this item can be awarded and the same is disallowed.

DISPOSITION.

CLAIM UNDER ACT OF MARCH 2, 1919.

This Board will make a statement of the nature, terms, and conditions of the agreement under which the Gilsonite Construction Co. is entitled to be paid compensation for the additional work involved, together with certificate Form C, and will transmit same to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular 17, Purchase, Storage, and Traffic Division, 1919.

CLAIM UNDER GENERAL ORDER 103, WAR DEPARTMENT, 1918.

A copy of this decision will be furnished the Claims Board, Air Service, for its information and guidance.

Col. Delafield and Mr. Bailey concurring.



JUNE 14, 1920.

**Case No. 2619.**

*In re* **CLAIM OF FIRESTONE TIRE & RUBBER CO.**

- 1. IMPLIED AGREEMENT.**—Where the American Army in France was in urgent need of rubber tires and tubes, and purchased same from claimant without the price being fixed and the goods were to be delivered in France, under the circumstances in this case claimant is entitled to freight and insurance charges.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,812.38 freight and insurance charges. Held, claimant entitled to recover.

Maj. Blackburn writing the opinion of the Board:

**FINDINGS OF FACT.**

This claim arises under the act of March 2, 1919, and was originally presented prior to June 30, 1919, to the United States liquidation commission at Paris, France, and by them referred to The Adjutant General of the Army at Washington, D. C. Statement of claim, Form B, was filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$3,712.38, with the Board of Contract Adjustment, April 21, 1920. This claim arises by reason of an agreement alleged to have been entered into between the claimant and the United States under the following circumstances:

The Board finds the following to be the facts:

1. During the month of October, 1917, the American Army in France was in great need of automobile tires and tubes. The Paris representative of the claimant company, David E. Wilcox, called on Col. F. H. Pope, assistant to the chief quartermaster, American Expeditionary Forces, United States Army, in charge of motor transportation, and informed Col. Pope that the claimant had on hand in England a large number of tubes and tires. Mr. Wilcox was then instructed by Col. Pope to submit, without delay, a complete list of tires and tubes which claimant could furnish to the Army. This list was thereafter submitted to both Col. Pope and Capt. Barrett Andrews. From the list so submitted there were selected for the use of the Army a certain number of tires and tubes, and an order was given by Col. Pope to claimant for the same. It was stipulated at this time that the tires and tubes so ordered were



to be delivered at Nevers, France, but no price was agreed upon nor fixed in the purchase order. The tires were shipped from the claimant's London branch to the point in France designated by Col. Pope, and were billed to the Army by the London office at about 30,000 pounds sterling, English money.

At a later date, Mr. Wilcox instructed the finance officer at Nevers, France, not to pay for the tires and tubes at the billing rate of the London office, inasmuch as the London branch was not familiar with the prices made by the claimant company to the Army in the United States, but that he (Wilcox) would shortly return to the United States, and that he would take the matter up with the home office at Akron, Ohio, and have the tires so delivered rebilled at a revised price in accordance with the prices which the Army in the United States was paying to the claimant for tires and tubes of like character and sizes. After his return to the United States the prices of these tires and tubes were revised, and a new statement of account was rendered to the Army in France which entailed a saving to the Government of the difference between the London prices and the American prices, which aggregated about \$30,000. This new statement included freight and insurance charges from London, England, to Nevers, France. Upon presentation of the revised bill, the finance officer at Nevers, France, paid for the tires and tubes delivered, but made no settlement with the claimant for the freight and insurance charges, for the reason that these charges were billed in English money. The disbursing officer instructed Mr. Arthur L. Manley, who succeeded Mr. David T. Wilcox as claimant's representative in France, to have the freight and insurance charges billed to them in terms of American money, at the rate of exchange prevailing on the day of the shipment, whereupon the same would be paid. This change was accordingly made, and the bill was again submitted, but upon the second presentation the officers at Nevers, France, who had in the first instance approved the bills, had been demobilized, and there was no one at motor transport headquarters in France who seemed to have any definite knowledge of the transaction. The matter was then presented to the liquidation commission at Paris, France, who held that, inasmuch as the claimant was a corporation created and existing under the laws of the State of Ohio, it was without jurisdiction to entertain the claim, and it was accordingly, by that commission, referred to The Adjutant General of the Army at Washington, D. C. Col. Pope, who ordered the tires in question from the claimant, had full authority to make this purchase; and with relation to the freight and insurance charges from London, England, to Nevers, France, he testified:

"There is no doubt in my mind \* \* \* that we [meaning the Army] would have paid pretty nearly any price that they [meaning the claimant] had asked for them, because we [meaning the Army] had to have them, and \* \* \* if they would simply bill these invoices with the freight and insurance charges, simply added in on the price of the tire without any special mention, the bill would have been passed without any trouble."

#### CONCLUSION.

1. From the foregoing facts we conclude that there was an agreement between the United States and the claimant to pay, not only for the tires actually delivered, but, in addition thereto, the freight and insurance charges incident to the transportation of these tires and tubes from London, England, to Nevers, France. This agreement has been ratified in part, inasmuch as the United States has paid the claimant for the tires and tubes so delivered. In view of all the circumstances, this claim is equitable and just.

#### DECISION.

1. The United States accordingly should reimburse the claimant for the amount expended in payment of freight and insurance charges on these tires from London, England, to Nevers, France.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Claims Board, Office of Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, 1919.

Col. Delafield and Mr. Marcum concurring.

JUNE 14, 1920.

**Case No. 2461. Part I.**

*In re* **CLAIM OF THE NATIONAL CONTRACTING CO.**

1. **JURISDICTION.**—The Secretary of War has no power to settle a claim arising under a formally executed contract, which has been fully performed, or which has expired by regular efflux of time.
2. **JURISDICTION.**—Where a formal contract is terminated by breach on the part of the contractor, the Secretary of War is without power to settle or adjust any claim arising under said contract.
3. **FORMER DECISION DISTINGUISHED.**—In the case of Henry Knight & Sons pending construction of the clause "all waste matter of every kind and nature, except rags, bags, and manure," certain waste matter by agreement of the parties was segregated, and it or its proceeds held until the meaning of the clause was determined; but no such action was taken in these claims.
4. **CLAIM AND DECISION.**—Claim under General Order 103 on formal contracts for unstated amounts for undelivered waste materials. Held, no jurisdiction.

Mr. Huidekoper writing the opinion of the Board.

This is a claim made under General Order 103, and arises out of formal contract for the purchase of waste at embarkation cantonment at Newport News, Va. Claimant alleges that the Government failed to deliver to it all waste material called for by its contract, and asks for a construction of the contract, and that the Government deliver to claimant all the waste material falling within the terms of said contract as so construed, and also to pay to claimant all moneys derived from the sale of waste material from said camp during the period mentioned in said contract.

The above case, No. 150-C-2461, includes a claim for waste material at the embarkation cantonment at Newport News and a claim for waste material at Camp Lee, Petersburg, Va. A separate opinion is written covering that part of the claim which refers to Camp Lee.

**FINDINGS OF FACT.**

1. On August 31, 1917, a formal contract was made and entered into between claimant and the United States in relation to the removal of waste material from the embarkation cantonment at Newport News, Va., which contract, by its terms, expired June 30, 1918. The contractor agreed to pay for such waste material the sum of 3 cents per month for each soldier and each person in Government

service at said camp during at least one-half the month for which payment is made. The contract further provides:

"1. The contractor agrees to purchase and remove all waste matter of every kind and nature except rags, bags, and manure from the embarkation cantonment at Newport News, Va.

"2. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation to be designated by the commanding officer in charge."

2. By petition filed with this Board on April 17, 1920, the claimant alleges that shortly after it began performance under said contract, a question of construction arose as to the meaning of the words "all waste matter of every kind and nature except rags, bags, and manure."

3. By said petition claimant further alleges:

"5. In accordance with the terms of the contracts, the contractor paid to the United States of America the sum charged per month for each soldier and each person in Government service at both of said camps during the entire period covered by said contracts and demanded that there be delivered to said contractor waste materials with the exception of rags, bags, and manure as the same accumulated at each of said camps, but the United States of America and the commanding officer in charge at both of said camps and their subordinate officers each and all refused and failed to either deliver to said contractor or to permit it to receive and have large and substantial quantities of waste material of various and sundry kinds and descriptions other than rags, bags, and manure, and there accumulated, as your petitioner is informed, believes, and charges, at said camps during the period covered by said contracts, to wit, the period between August 31, 1917, and June 30, 1918, in addition to many other articles of waste material, the exact number of which is not within the knowledge of this petitioner, but is within the knowledge of the United States of America, the following specific articles of waste:

	In excess of—
Auto radiators.....	200
Barrels .....	3, 000
Cases .....	1, 800
Knives .....	300
Auto parts .....	pounds 280, 000
Baling wire .....	do 500, 000
Brass, including light yellow, red, heavy yellow, and turnings.....	do 5, 000
Composition .....	do 3, 500
Condemned oats, corn, and other foodstuffs.....	do 360, 000
Copper, light and heavy, and including wire, insulated and uninsulated .....	pounds 3, 800
Horseshoes.....	do 160, 000
Hose.....	do 3, 000
Aluminum, all kinds.....	do 4, 800
Inner tubes, all kinds.....	do 3, 800
Iron, all kinds.....	do 675, 000
Leather, scrap, and miscellaneous.....	do 5, 000
Lead, all kinds.....	do 8, 900
Nails.....	do 2, 750
Roachings, mane and tail.....	do 1, 600
Rubber, exclusive of tires.....	do 37, 000

	In excess of--
Steel, all kinds -----	pounds-- 220, 000
Stove plates and grates -----	do----- 160, 000
Tires. auto -----	do----- 9, 100
Tires, motor cycle -----	do----- 4, 400
Tubing. all kinds -----	do----- 3, 200

"The foregoing list of articles is an estimate and the tabulation of articles is based upon the best information available to this petitioner and it is believed that there accumulated at each of said camps during the period covered by the contracts hereto attached, in excess of the number of each article designated."

4. This contract expired June 30, 1918, and it does not appear that the claimant made any claim thereunder until February 3, 1920, a period of nearly 20 months after the expiration of the contract. Although the petition recites that a question of construction as to the meaning of paragraph 1 of the contract arose shortly after the claimant commenced performance, from all that appears either in the petition or in the papers submitted herewith, there is nothing to show that during the performance of this contract but what the claimant acquiesced in the construction placed on the contract by the United States and accepted the waste material so designated by the Government officials and made the monthly payments as specified in said contract, and to all intents and purposes the contract was fully performed and completed both by the United States and the contractor.

5. Claimant, by paragraph 5 of its petition above quoted, alleges upon information and belief that there accumulated between August 31, 1917, and June 30, 1918, many articles of waste materials in excess of a specified amount, which in said petition is set forth, but said petition fails to show, and there is no proof in the records before this Board, that any of the articles therein enumerated were waste materials. The very nature of the items enumerated would not of itself suggest that said articles were waste material, and further action on the part of Government officials would be necessary before said property could be designated waste material. On August 31, 1917, the date of this contract, the sale of Government property used by the Army was regulated by section 1972 of the Compiled Statutes, which reads as follows:

"The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

The Secretary of War, by sections 678, 679, and 680 of the United States Army Regulations, prescribed the manner in which sales of public property shall be made and these regulations require that a survey be made and the property condemned before being sold. It

has been held that there is no authority to sell or dispose of Government-owned material until the required procedure, above mentioned, is had.

DECISION.

1. Claimant in its petition refers to and relies upon the decision of this Board in the claim of Henry Knight & Sons, No. 150-C-1736, but the facts set forth in that case are essentially different from the ones here presented. In the Knight case it appears that claimant and the Government officials were in doubt as to the meaning of the clause "all waste matter of every kind and nature, except rags, bags, and manure," and that pending a construction of said clause certain waste matter was, with the consent of the claimant, either segregated or sold and the money realized on the sale was held by the Government as a stakeholder, with the consent of claimant, pending a construction of said clause, and thus the amount became liquidated. Where the material was segregated the Government also held the possession of the waste material pending the determination. The only question presented in that claim was one of construction of a formal contract and when that was determined the Government was in a position to either deliver the money or the waste material to the claimant.

2. In this case, no such proceeding was taken and so far as the record discloses the Government did not hold any money or waste material pending the construction of said clause. If the Government has withheld or sold any of the waste material here claimed, it is not alleged to have done so with the consent of this claimant. The amount here claimed is wholly determined. If the Government failed and refused to deliver to claimant all the waste material called for by its contract claimant would have a cause of action against the Government for a breach of the contract in which action claimant could recover all the damages it sustained. Of such a claim we have no jurisdiction.

3. The record in this case shows that the contract out of which the claim arises was a formal contract executed in accordance with the law, which has been fully completed by the parties and has expired by its own limitation. The Secretary of War is without jurisdiction to settle or adjust such contract or to make a supplemental agreement and the claimant's remedy, if any, is to resort to the court having jurisdiction of such claims.

DISPOSITION.

A final order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.



JUNE 14, 1920.

**Case No. 2461. Part II.**

*In re* **CLAIM OF NATIONAL CONTRACTING CO.**

Mr. Huidekoper writing the opinion of the Board.

This claim arises under General Order 103. Claimant alleges there is due to it waste material produced at Camp Lee, Petersburg, Va., as required by its contract, and further, that in event any of said waste material has been sold, the United States deliver to claimant the moneys received from said sale.

**FINDINGS OF FACT.**

1. A formal contract was entered into between claimant and the United States, dated August 31, 1917. By the terms of this contract the contractor agreed to pay 4 cents per month for each soldier and each person in the Government service. In return for this payment the contractor was to receive all waste matter that was produced at Camp Lee, Petersburg, Va., with certain exceptions as stated in contract. The contract further provides:

“(1) The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, and manure from Camp Lee, Petersburg, Va.

“(2) All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation, to be designated by the commanding officer in charge \* \* \*.”

“(5) The following classes of waste shall be collected and delivered to the contractor in separate receptacles: (a) Bones, (b) fats and tallow, (c) all other garbage, (d) paper, (e) bottles, (f) rope or twine, (g) cans.

“(6) All dead animals shall be considered as paid for by the contractor by the monthly payment hereinbefore provided, and shall be removed as directed by the commanding officer, and, upon removal, shall become the property of the contractor.”

2. The contractor entered into the performance of its contract and continued until the month of March, 1918. By the affidavit of E. L. Field, secretary of claimant, verified April 13, 1918, it appears that the United States had failed to collect and deliver to the claimant in separate receptacles the waste material as required by



paragraph 5 of the contract. That although the Government failed for a period of four months to properly separate the waste matter, the claimant at a great loss and expense to it removed all the waste matter notwithstanding the fact that it was not separated. That dead horses when delivered to claimant frequently had the tails and manes cut off, thus depreciating the value of the hide and violating the provisions of clause 6 of said contract above quoted, and on various occasions dead horses were burned at the expense of the Government, in the presence of the employees of claimant who were there ready to remove such dead animals in accordance with the terms of the contract. For the reasons above stated, claimant refused to make the monthly payments as required by the contract. The claimant in this affidavit makes no claim that the Government was not delivering to it all the waste material called for by the contract with the exception of the dead horses, but on the contrary the affidavit alleges "that this company has from time to time and at all times until the 29th day of March, 1918, removed from said Camp Lee, Petersburg, Va., all waste matter as provided for in said contract and has furnished proper superintendence, labor, and facilities for said work."

The claimant abandoned the contract on or about March 21, 1918, with payments aggregating \$3,447.75 due the Government. This matter was made the subject of an investigation and was placed in the hands of the Attorney General of the United States for collection of amount due and damages and settlement was made in full by claimant on May 29, 1918.

3. While this matter was under investigation, the claimant submitted a new proposal for a renewal of the contract, which was finally accepted on May 10, on which day another contract was made and entered into between claimant and the United States, covering the purchase and removal of all waste matter of every kind and nature, except rags, manure, trap grease, tin cans, bottles, paper, rope, and twine from Camp Lee, Petersburg, Va., from May 10, 1918, to June 30, 1918, which was a portion of the time covered by the contract executed on the 31st day of August, 1917.

#### DECISION.

1. The record in this case shows that the contract, out of which the claim arises, was a formal contract executed in accordance with the law; that the contract was breached by the claimant in refusing to make the payments in accordance with its terms, and claimant was compelled by the Attorney General to make such payments, and

that as a result of said settlement claimant entered into a new contract with the United States to purchase the waste material at said camp from May 10, 1918, to June 30, 1918, which was a portion of the period covered by the original contract. That in view of said breach the Secretary of War is without jurisdiction to settle or adjust any claims arising under the contract dated August 31, 1917. No claim is made under the contract of May 10, 1918, therefore, we are not called on to construe that contract.

**DISPOSITION.**

An order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.

JUNE 14, 1920.

Case No. 2698.

*In re* CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.

1. **RAILROAD FACILITIES—IMPLIED AGREEMENT.**—The construction of railroad facilities to handle traffic in connection with an Army cantonment does not raise an implied agreement on the part of the Government to pay for same.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,823.53, based upon an implied agreement in relation to the construction of railroad facilities at Camp Sevier. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Transportation Service Claims Board, War Department, on a claim for \$3,823.53 on an alleged oral contract, under the following circumstances:
2. In the fall of 1917 the Government established near Greenville, S. C., a National Guard cantonment known as Camp Sevier. Said camp was located near the line of claimant company.
3. Large numbers of laborers and troops were being handled by claimant company to and from said camp and it became necessary that adequate station facilities be constructed. Claimant company proceeded to erect at Paris, S. C., a passenger station at an expense of \$3,823.53. This station was located on claimant's right of way.
4. The evidence discloses that claimant company constructed said station upon its own initiative in order that it might properly handle its passenger traffic, and there is no evidence of any authorization upon the part of the camp quartermaster, or any other officer or agent of the United States Government, for the construction of this passenger station.

DECISION.

1. The act of March 2, 1919, under which claimant must recover, if at all, prescribes that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, entered into

with any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation.

2. The evidence discloses that there was no agreement, either express or implied, entered into between claimant company and any officer or agent acting under the authority, direction, or instruction of the Secretary of War for the construction of this passenger station.

3. Relief, therefore, must be denied.

DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

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JUNE 14, 1920.

Case No. 2705.

*In re* CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.

1. **RAILROAD FACILITIES—IMPLIED AGREEMENT.**—The construction of railroad facilities to handle traffic in connection with any Army cantonment does not raise an implied agreement on the part of the Government to pay for same.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$1,841.33, based upon an implied agreement in relation to the construction of railroad facilities at Camp Wadsworth. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Transportation Service Claims Board, War Department, on a claim for \$1,841.33 on an alleged oral contract, under the following circumstances:
2. During the fall of 1917 the Government established a National Guard cantonment near the city of Spartanburg, S. C., known as Camp Wadsworth.
3. On the line of the claimant company there was a station known as Lenwood.
4. Claimant alleges that pursuant to an oral agreement between Lieut. Col. John D. Kilpatrick, the constructing quartermaster at Camp Wadsworth, and Mr. E. Thomason, vice president and general manager of claimant company, a passenger station was constructed by claimant company at the location on the eastern border of the Army reservation designated by the said Lieut. Col. Kilpatrick.
5. The testimony fails to disclose that any agreement was made between Mr. Thomason and Lieut. Col. Kilpatrick, or any other officer or agent of the United States Government, for the construction of this passenger station; that the passenger station was constructed upon the property of the claimant company, and that Lieut. Col. Kilpatrick had nothing to do with the same, except at the suggestion of Mr. Thomason he designated the most convenient location on the eastern border of the Army reservation, Camp Wadsworth, for the location of said station.

## DECISION.

1. The act of March 2, 1919, under which claimant must recover, if at all, prescribes that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, entered into with any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation.

2. In order that claimant may recover herein it must establish that it entered into an agreement under said act.

3. The evidence herein fails to disclose that any agreement was entered into between Lieut. Col. Kilpatrick, or any other officer or agent of the Government, and the claimant company, or any of its representatives, for the erection or construction of a passenger station at Lenwood, Camp Wadsworth.

4. There having been no agreement, express or implied, entered into between claimant company and any officer or agent of the United States, relief must be denied.

## DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 14, 1920.

Case No. 2704.

*In re* CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.

1. **RAILROAD FACILITIES—IMPLIED AGREEMENT.**—The construction of railroad facilities to handle traffic in connection with any army cantonment does not raise an implied agreement on the part of the Government to pay for same.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,019.95, based upon an implied agreement in relation to the construction of railroad facilities at Camp Wadsworth. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Transportation Service Claims Board, War Department, on a claim for \$3,019.95 on an alleged oral contract, under the following circumstances:

2. During the fall of 1917 the Government established a National Guard cantonment near the city of Spartanburg, S. C., known as Camp Wadsworth.

3. Claimant alleges that pursuant to an oral agreement between Lieut. Col. John D. Kilpatrick, constructing quartermaster at Camp Wadsworth, and Mr. E. Thomason, vice president and general manager of claimant company, a passenger depot and shed were constructed by claimant company at the location on the western border of the Army reservation designated by the said Lieut. Col. Kilpatrick.

4. The testimony fails to disclose that any agreement was made between Mr. Thomason and Lieut. Col. Kilpatrick, or any other officer or agent of the United States, for the construction of this passenger depot and shed; that the said passenger depot and shed were constructed upon the property of the claimant company, and that Lieut. Col. Kilpatrick had nothing to do with the same, except at the suggestion of Mr. Thomason, he designated the most convenient location on the western border of the Army reservation, Camp Wadsworth, for the location of said depot and shed.



## DECISION.

1. The act of March 2, 1919, under which claimant must recover, if at all, prescribes that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, entered into with any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation.

2. In order that claimant may recover herein, it must establish that it entered into an agreement under said act.

3. The evidence herein fails to disclose that any agreement was entered into between Lieut. Col. Kilpatrick, or any other officer or agent of the United States, and the claimant company, or any of its representatives, for the erection or construction of a passenger depot and shed on the western border of the Army reservation, Camp Wadsworth.

4. There having been no agreement, express or implied, entered into between claimant company and any officer or agent of the United States, relief must be denied.

## DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 14, 1920.

**Case No. 2700.**

*In re* **CLAIM OF PIEDMONT & NORTHERN RAILWAY CO.**

1. **RAILROAD FACILITIES—IMPLIED AGREEMENT.**—The construction of railroad facilities to handle traffic in connection with an army cantonment does not raise an implied agreement on the part of the Government to pay for same.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$10,691.91, based upon an implied agreement in relation to the construction of railroad facilities at Camp Sevier. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Transportation Service Claims Board, War Department, on a claim for \$10,691.91 on an alleged oral contract, under the following circumstances:

2. During the fall of 1917 the Government established near the city of Greenville, S. C., a National Guard cantonment known as Camp Sevier.

3. Prior to the decision of the War Department to establish this camp the chamber of commerce of the city of Greenville, S. C., made representations to the Secretary of War, and upon those representations Maj. Gen. Leonard Wood went to Greenville and made a personal inspection of the proposed camp site. In his official report to the Secretary of War upon the availability of the camp site he states, among other things, that the railroad companies adjacent to the camp site, one of which was the claimant company herein, agreed to construct all necessary side track and other railway facilities for the proper maintenance and handling of the railroad transportation at such camp.

4. During the construction of the camp J. F. Gallivan, who was the civilian contractor constructing Camp Sevier, requested claimant company to put in a cross-over track connecting claimant's main line with the Southern Railway Co.; also to construct spur and side tracks for the proper handling of freight, lumber, sand, and other materials necessary in the construction of the camp, and later for the proper handling of the freight that might be received there.

5. The evidence discloses that these were some of the necessary trackage facilities which Gen. Wood reports the railroad companies had agreed to construct.

6. Claimant company states that it never agreed with Gen. Wood or the Chamber of Commerce of Greenville, S. C., to construct any of these sidetracks, crossovers, or spurs, but also testified that at the time of Gen. Wood's official report it was a member of the Greenville Chamber of Commerce and was more or less familiar with the reports made by the committee of the said chamber of commerce upon the progress of the campaign to establish the camp near Greenville.

7. Mr. E. Thomason, vice president and general manager of claimant company, and Mr. Allen, its traffic manager, testified that the only person who ever requested that these side tracks, spurs, and crossover tracks be constructed was the civilian contractor, Mr. Gallivan; that they never entered into any agreement, either express or implied, with any officer or agent of the Government having authority to make contracts or agreements for the Government.

#### DECISION.

1. The act of March 2, 1919, under which claimant must recover, if at all, prescribes that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, entered into with any officer or agent acting under his authority, direction, or instruction, or that of the President with any person, firm, or corporation.

2. Mr. J. F. Gallivan, the only person with whom claimant company talked about the additional side-track facilities, including crossover, wye, etc., was the civilian contractor for the construction of the camp, and had no authority to enter into any contracts such as those for which reimbursement is asked herein. Claimant company expressly states that it never had any conversation or agreement with the construction quartermaster at Camp Sevier, or any other officer acting under the authority of the Secretary of War.

3. It is therefore the opinion of this Board that no agreement, either express or implied, was entered into between the claimant company and the United States under the act of March 2, 1919.

4. Relief, therefore, must be denied.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 15, 1920.

Case No. 2576.

*In re* CLAIM OF SKINKER & GARRETT (JOHN T. LIVEZEY).

1. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, by subcontractor under a proxy-signed contract for \$2,324.54 for pipe covering. The contract was changed during performance by substitution of materials and a controversy having arisen as to the price of the substituted material, viz, 85 per cent magnesia covering, it is Held, that the subcontractor is entitled to the list price less 12½ per cent discount.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the constructing quartermaster, Walter Reed Hospital, on a claim for \$2,324.54 on a contract, hereinafter more particularly referred to.
2. The claim was originally filed in the name of John R. Livezey, but at the hearing was amended so as to be brought in the name of Skinker & Garrett for the benefit of John R. Livezey, subcontractor.
3. Skinker & Garrett received a contract dated the 22d of May, 1918, for the erection of certain buildings at Walter Reed Hospital. This contract was amended July 1, 1918, to include the installation of heating equipment. Thereupon Messrs. Skinker & Garrett, with the approval of the Government, made arrangements with W. G. Cornell & Co. to install the heating equipment.
4. In pursuance of the contract with Skinker & Garrett, the Government on September 21, 1918, and September 24, 1918, placed two requisition orders with W. G. Cornell & Co. for the installation of certain diatomaceous-earth pipe coverings, the cost of which was to be paid by Skinker & Garrett under their contract.
5. W. G. Cornell & Co. in turn made arrangements with John R. Livezey as subcontractor to furnish the material and to do the work.
6. It shortly developed that it would be impossible to obtain the required amount of diatomaceous earth and, therefore, Mr. R. Willis Lysle, an employee of John R. Livezey, called upon Mr. William A. Rogers, a purchaser of material and supplies, and Capt. Richard L. Ruppel, engineering department, Construction Division, to obtain

permission to substitute 85 per cent magnesia covering so far as the diatomaceous-earth covering could not be secured.

7. The present controversy arises out of a difference of opinion as to the effect of the conversation which ensued. At the hearing R. Willis Lysle was called as a witness by the claimant and Messrs. Ruppel and Rogers by the Government. Their testimony did not differ in substance.

8. It appeared that the prices for materials known as diatomaceous-earth covering and 85 per cent magnesia coverings are determined from a published list of prices known as standard list prices, by making certain discounts from such standard list prices, greater or smaller, according as the market fluctuates. The standard list prices for the two types of covering were the same.

9. At the interview in question Mr. Lysle was told by the Government's agents that substitution of 85 per cent magnesia for diatomaceous earth might be made, provided the contract price for the covering installed was reduced by  $12\frac{1}{2}$  per cent (15 per cent gross less  $2\frac{1}{2}$  per cent for freight and cartage) of the standard list price for 85 per cent magnesia.

10. John R. Livezey thereupon completed the work.

#### DECISION.

1. In calculating the amount due, the Government accountants apparently were not advised of the exact arrangement entered into. We find the correct method of computing the amount to be paid for the 85 per cent magnesia covering installed is to allow the contractor for installed covering the contract price, less  $12\frac{1}{2}$  per cent of the standard list price of the respective sizes of 85 per cent magnesia coverings.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, for appropriate action. Col. Delafield and Mr. Tanner concurring.

JUNE 15, 1920.

Case No. 2666.

*In re* CLAIM OF ELISEO ESPAILLAT.

1. **CONSTRUCTION OF CONTRACT.**—Where the claimant had a contract for the production, sale, and delivery of castor beans to the United States in San Domingo at a fixed price, and the contract provided that if, during the life of the contract, a higher price should be fixed by the Government, or any authorized agency thereof, the claimant should be paid such increased price and the price was so raised for beans delivered in the United States, the claimant is entitled to such proportionate increase for beans delivered in San Domingo.
2. **JURISDICTION UNDER SECTION 3, ACT OF MARCH 2, 1919.**—The Secretary of War, and this Board when designated, has power to settle and adjust a formal contract under section 3 of the act of March 2, 1919, upon such terms as he or it may determine to be in the interest of the United States, and to be equitable and fair, although the contract has been performed, or terminated in some other manner.
3. **TERMS OF SETTLEMENT.**—Where the claimant under the formal contract was expected to stimulate the production of castor beans by engaging in propaganda, educating and organizing the people for a large production and to create a large source of supply for the United States, and to be remunerated from the profits, and the yield is less than anticipated, it would be fair and equitable and to the interest of the United States to reimburse and remunerate claimant for expenditures so made and services thus performed, although the formal contract was not suspended and has been performed by the contractor who has not been paid by the Government, which disputes the price.
4. **METHOD OF SETTLEMENT—AND PROCEDURE.**—The formal contract and the informal contract involved herein will be settled on the principles and rules governing the settlement of informal contracts, and claimant is given further opportunity to show his expenditures, commitments, and other allowable costs.
5. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$500,000 alleged loss on castor beans. Held, claimant entitled to recover in part.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This claim is for \$500,000, and comes before this Board for adjustment under the following order of the Secretary of War, May 12, 1920:

“With reference to the claim of Eliseo Espailat, under section 3 of the act approved March 2, 1919, under the contract of January 9, 1918, entered into by the claimant with Maj. A. C. Downey, Signal

Corps, representing the United States of America, and under supplemental contracts thereto, for the supply of castor beans, the War Department Board of Contract Adjustment is hereby designated, in accordance with the terms of section 3, as the agent of the Secretary of War to make such readjustment in the premises as it may determine to be in the interest of the United States."

The facts of the case are as follows:

1. Under date of January 9, 1918, the United States (acting through Maj. A. C. Downey, Signal Corps, contracting officer) entered into a contract with Eliseo Espaillat, a citizen of the Dominican Republic, by which the said Eliseo Espaillat undertook and agreed, either by himself or through subcontractors, to plant and grow on approximately 5,000 acres of land in the Dominican Republic a crop of castor beans during the year 1918, and to deliver from said crop not to exceed in any event the quantity of 500,000 bushels, at his warehouses at the following ports in the Dominican Republic: Puerto Plata, Sanchez, or Monte Christi; and the Government of the United States agreed to purchase said beans at the price of \$3 per bushel of 46 pounds of shelled beans in said warehouses, the contract also providing, among other things—

"that if at any time during the life of this contract a price shall be fixed by said Government (meaning the United States Government), or by any person, body, or commission thereunto duly authorized by said Government, which price shall be higher than that heretofore named, then and in that event the Government agrees to pay the contractor the higher price so fixed."

Thereafter, on March 8, 1918, the above contract was amended so as to include San Domingo City as a port of delivery. Thereafter, on June 19, 1918, the contract of January 9, 1918, was further amended so as to provide for the planting and growing of castor beans upon an additional 3,000 acres, and also that the 500,000 bushels of castor beans contemplated in said contract of January 9 might be delivered from beans grown from the acreage planted or from beans purchased in the open market in the Dominican Republic, and expressly continued in operation all other provisions of the contract of January 9, 1918.

2. Thereafter cable negotiations were conducted between the said Eliseo Espaillat and the Bureau of Aircraft Production with a view to increasing the acreage to be planted and beans to be sold and delivered to the United States. It is deemed essential to set out extracts from only two of these cablegrams, as follows:

(a) Cablegram from the Bureau of Aircraft Production to Eliseo Espaillat dated October 24, 1918, transmitted in letter of October 29 from Clement B. Edwards, United States consul at Santo Domingo, Dominican Republic:



"The Government will renew the present contract for 8,000 acres and in every respect an additional contract for 2,000 acres, both contracts to expire on January 1, 1920. The Government desires largest possible planting without interfering with the food production of the country. The new price of castor beans is 9 cents and 8 mills per pound ex dock, duty paid at United States port, this price to apply on present contract. \* \* \* The restricting of import licenses to the contractor will be granted, provided maximum quantity secured in addition to the subcontracts."

(b) Cablegram transmitted on October 31 by Eliseo Espaillat to Clement B. Edwards, United States consul at Santo Domingo, Dominican Republic, for the Bureau of Aircraft Production, Washington:

"Referring your cable October 24. Renewal present contract 8,000 acres and new contract 2,000 acres accepted. Beginning new propaganda immediately. Increased price of 9 cents 8 mills per pound in the United States very gratifying and will result in greater production. Essential that you cable immediately and definitely price to be paid contractor for castor beans delivered to Government at his warehouses in the Dominican ports specified in contract based upon new price."

3. Before we are able to formulate a definite statement of the contractual obligations existing between the parties in this case there are two matters which call for some discussion:

(a) *The price to be paid by the United States for castor beans.*—The contract of January 9, 1918, provided that the Government would pay the petitioner \$3 per bushel for the shelled beans at the Dominican ports, but that if at any time during the life of the contract a higher price should be fixed by the Government of the United States, that price should prevail. It appears that on or about October 25, 1918, a committee appointed at the instigation of the Bureau of Aircraft Production increased the price of castor beans delivered in the United States from \$3.50 per bushel to \$4.50 per bushel. From this fact, and from other evidence adduced, we conclude that on October 30, 1918, the petitioner was entitled to this increase of \$1 per bushel, and that this additional \$1 per bushel should be added to the price which the Government was to pay petitioner for all beans delivered at Dominican ports, such price to apply to all existing contracts between petitioner and the Government of the United States.

(b) *Import restrictions upon shipments of castor beans from the Dominican Republic to the United States.*—It is the contention of petitioner that at the time the original contract was made with the Government of the United States for the planting and growing of castor beans in the Dominican Republic that the Government undertook and agreed to so restrict the importation of castor beans by

other parties from Santo Domingo to the United States as not to interfere with the securing by the petitioner of castor beans which had been produced, or would be produced, under the influence of petitioner's propaganda. The reason assigned by petitioner for desiring, or asking for, such restriction was this: That petitioner had expended, and would expend, considerable sums of money in forming an organization for the growing of castor beans and in propaganda tending to encourage the production of this crop, and that if parties who produced the crop were able to ship their beans directly to the Government at the same price which the Government was paying petitioner, then the beans so produced as the result of petitioner's efforts would be sold by the producer directly and petitioner would lose the profits upon their resale out of which he intended to recoup the expenses incurred in encouraging and producing the crop. So far as the original contract of January 9, as subsequently modified by any amendment, either increasing the acreage to 8,000 acres or adding the privilege of buying in the open market, is concerned, it is very plain that while the petitioner sought to secure from the Government an obligation to impose restrictions upon the importation into the United States of beans produced by other parties in Santo Domingo, and while it is also very plain that such an arrangement would have operated distinctly to the advantage of petitioner, and there would have been some justice and equity in granting such a privilege, the evidence does not disclose that the Government ever entered into such an agreement with petitioner, but the producers of castor beans in Santo Domingo were permitted, under certain restrictions that were exercised by the Bureau of Aircraft Production, to ship their beans directly from Santo Domingo to the United States, and this was done not in violation of any obligations of the United States to the petitioner. When we come, however, to consider the informal contract that was entered into on October 30, 1918, with respect to the beans to be produced from 10,000 acres in 1919, as hereinafter more specifically considered, we must be guided by the statement made by the Bureau of Aircraft Production in the cablegram of October 24, 1918, which, in the opinion of this Board, obligated the United States to place an embargo upon the importation of castor beans from other parties than the petitioner in the Dominican Republic to the United States provided the petitioner secured, either directly or through subcontractors, plantings of castor beans aggregating 10,000 acres.

4. We conclude, therefore, that there existed between the petitioner and the Government of the United States the following agreements:

(a) A formal contract of January 9, 1918, as amended, by which the petitioner undertook to plant, cultivate, and harvest during 1918, 8,000 acres of land in castor beans in Santo Domingo, and to deliver

to the United States from the crop produced therefrom or from purchases made in the open market in Santo Domingo any quantity up to 500,000 bushels of castor beans, and by which the Government of the United States undertook to purchase the beans so delivered up to March 1, 1919, at the said ports, at \$4 per bushel, and subject to all other provisions of the contract of January 9, 1918, with no obligations upon the part of the Government of the United States to prevent the importation of castor beans directly from other parties in Santo Domingo to the United States.

(b) An informal agreement of October 30, 1918, evidenced by cablegrams and otherwise, by which the petitioner undertook and agreed to harvest the crop from 10,000 acres of castor beans in Santo Domingo in 1919, and to deliver from said crop or from purchases made in the open market in Santo Domingo any quantity up to 625,000 bushels of castor beans at certain Dominican ports, and by which the United States agreed to purchase the said beans at the ports mentioned at \$4 per bushel, all other terms not inconsistent with the above contained in the contract of January 9, 1918, to apply, with the obligation also resting upon the United States to restrict import licenses to the petitioner subject to the petitioner securing plantings of 10,000 acres.

5. We come next to the question of the cancellation of the informal agreement mentioned above, and it is deemed essential to quote at some length from the correspondence between the parties, which correspondence not only deals with the question of the cancellation of the informal agreement, but bears also particularly upon the matter of the price to be paid for all deliveries of beans, and special attention must be given to this question of price as bearing upon any equitable liability of the Government of the United States with respect to securing and delivering beans under the 1918 contract. By letter of November 9, 1918, Mr. Edwards, the American consul, notified the petitioner as follows:

"In reply to yours of October 30, I am instructed to inform you that in view of the changed situation the renewal of present contract 8,000 acres and new contract 2,000 acres can not be made. New price on contract 9.8 cents per pound ex-dock duty paid. No new price paid only on this basis. Will assist you to obtain tonnage if necessary."

Under date of November 11 petitioner wrote Mr. Edwards declining to accept such cancellation upon the grounds that commitments had in the meantime been made and under date of November 12 sent to Mr. Edwards for transmission to the Bureau of Aircraft Production the following cablegram:

"Regarding your statement that renewal of old and entering into new contract can not be made. As the previous interchange of cables

clearly constitutes an offer and acceptance and specifically gives me authority to begin work immediately, and inasmuch as acting in good faith, I have acted upon such instructions and have entered into subcontracts obligating myself until January 1, 1920, I can not accept your notice as breaking said renewal of old contract nor as breaking the said new contract. Such action would involve the questions of my acting in bad faith with the subcontractors, and, furthermore, threaten me with financial ruin. Your attention is also called to the fact that my contracts call for delivery to the Government at my warehouses in Dominican ports as well as the fact that the Government must pay any higher price fixed during life of contracts. Neither, therefore, can I accept your statement as altering that part of the contracts calling for delivery in Dominican ports nor waive my rights to an increase in price as a result of the new price fixed by the Government, which increase I am obligated by my subcontracts to turn over to the subcontractors. Immediate action is essential."

Under date of November 11, 1918, Maj. Mayer, of the Bureau of Aircraft Production, wrote petitioner as follows:

"You are informed that Mr. Robert Bain, representing this section, will leave Washington in the very near future for the West Indies and will visit Santo Domingo for the purpose of investigating and inspecting your contract No. 2579 for the planting and growing of castor beans.

"Anything you can do to facilitate the work to be accomplished by Mr. Bain in Santo Domingo will be appreciated."

Under date of November 14 the Bureau of Aircraft Production wrote petitioner as follows:

"Reference is made to aircraft production contract No. 2579, covering order No. 71683, which provides for the purchase of shelled castor beans to be grown on approximately 5,000 acres of land in the Dominican Republic.

"Article III of said contract provides that if at any time during the life of the contract a higher price is fixed by the Government for castor beans such price shall be paid to the contractor.

"You are hereby advised that the committee on revision of price for castor beans in the United States has made a report establishing a price of \$4.50 per bushel of 46 pounds to the growers.

"In order to allow you the same price which is allowed to growers in the United States, order 71683 is amended to provide that you shall be paid \$4.50 per bushel of 46 pounds for all beans delivered by you pursuant to the terms of the contract above mentioned."

Under date of November 25 Mr. Edwards, American consul, transmitted to petitioner the following cablegram from the Bureau of Aircraft Production:

"Your November 15. Make no further expenditures or obligation on proposed new agreement and stop expenditures of new subcontractors. Request information to what extent you are obligated and approximate amount of money required to make equitable settlement of cancellation of proposed new agreement, price nine and

eight-tenths cents, ex-dock duty paid New York on that figure, less costs, insurance, freight, and duty at Dominican ports. Representative will call to ascertain facts."

Under date of November 26 petitioner sent to Mr. Edwards, for transmission to Washington, the following cablegram:

"Referring your November 24. Have notified subcontractors to stop all expenditures on renewal and new contract. I am obligated to the extent of approximately 5,000 acres of new contracts and agreements. Unable at present to state approximate amount of money required to make settlements. Suggest that prompt settlement will be advantageous to Government. Will await arrival of your representative. When will he arrive? Statement regarding price still not clear. Advise definite price to be paid contractor for castor beans at warehouses in Dominican ports under articles 2 and 3 of old contract. Must have this information in order to fix new price to subcontractors."

Under date of November 27 the Bureau of Aircraft Production wrote petitioner as follows:

"Reference is made to order No. 71683 placed with you January 14, 1918, for castor beans and to its subsequent amendment dated November 14, 1918.

"Inasmuch as the price as amended of \$4.50 per bushel was established by the committee on the revision of price for castor beans in the United States only, you are advised that the order is hereby further amended to provide for beans to be delivered ex-dock United States ports, all costs and duties paid."

Under date of December 5 petitioner sent to Mr. Edwards, for transmission to Washington, the following cablegram:

"Refer to our cablegram November 26. Must have immediate and definite reply thereto. Any further delay on your part in arranging for inspection and acceptance here of castor beans and fixing increased price will have serious consequence for me, financial and otherwise. I am ready and willing at all times to carry out my part of contracts and make prompt arrangements for inspecting and receiving beans at my warehouse, Dominican ports, all in accordance with terms of contract. Please telegraph at once increased price for beans, delivered to you at my warehouses, Dominican ports, as my subcontractors are rightfully demanding that such increased price be fixed. I am not interested in increased price which applies only to delivery ex-dock United States ports all costs and duties paid. Please fix and state by telegraph a definite increased price for beans delivered by warehouses, Dominican ports, pursuant to terms of contract. Further delay will be greatly prejudicial not only to me but to United States Government."

Under date of December 19, 1918, the Bureau of Aircraft Production wrote petitioner as follows:

"Reference is made to the proposed new agreement, by cable, for the planting and growing of castor beans on approximately 10,000 acres of land in the Dominican Republic, 8,000 acres of which you



have under the present contract and 2,000 acres of which you were to cause to have planted in addition.

"You are informed that your final acceptance of the proposed agreement, your cable dated October 30, was received on November 2; but in view of the changed conditions just after your cable was received, it was found that a contract could not be made with you and you were so notified by cable from this office on November 6.

"For your information, attached is an extract from a decision of the Comptroller of the Treasury with regard to proposed agreements that had not become executed contracts. It is possible, however, that special provisions may later be made for such cases.

"Copies of your cables and cables from this office, relating to the proposed agreement with you, will be sent to the contract department of this bureau for their files, with a memorandum inviting at a future date, provided the necessary action is taken to cover such cases.

"It is noted by your cable of November 27 that you are obligated for approximately 5,000 acres. It is presumed that this amount represents new contracts or renewed contracts that you have made with some of your present contractors for land that is planted to castor beans under your present contract with the Government, and where no additional expenses have necessarily been incurred by your contractors.

"Since the signing of an armistice and the probable end of the war in the near future, the Government does not anticipate making any additional contracts for the planting and growing of castor beans. This office trusts that you will be able to make some satisfactory arrangement with your contractors, with whom you have new agreements, to cancel such agreements without loss.

"It is also noted in the same cable that you have notified your contractors to stop all expenditures on renewals and new contracts. You were requested to take such action in a cable from this office dated November 20, as the Government did not desire you or your contractors to make any expenditures or obligations on the proposed new agreement with the Government."

Under date of December 20, 1918, the Bureau of Aircraft Production wrote petitioner as follows:

"Referring to your inquiry by cable in regard to the new price established by the Government for castor beans, you are advised that new price of \$4.50 for 46-pound bushel of castor beans, hulled and sacked, applied to accepted castor beans delivered to the Government within the United States; in case of those grown under contract outside of the United States, the price of \$4.50 for 46-pound bushel of castor beans, hulled and sacked, delivered ex-dock United States port, duty and all other expenses paid.

"Your contract has been amended accordingly by the contract department, as article three of your contract gives you the benefit of any increase in price. The change in price, however, does not give you the alternative of an increase in price for the delivery of accepted castor beans Dominican port. If you do not desire the above referred to amendment to your contract, the Government will purchase all accepted castor beans delivered under your con-

tract at \$3 for 46-pound bushel of hulled and sacked castor beans, Dominican port, as provided by the terms of your original contract.

"This office appreciates the difficulty in communicating by cable and trusts that the above will make clear to you the application of the new price and how it affects your contract.

"Upon receipt of information from you in regard to a definite decision as to where you wish to make delivery of these beans to the Government, this office will act accordingly.

"This section is not in position to state when the representative referred to in cable from this office, will call upon you as, owing to changed conditions, he was unable to leave as expected.

"It is requested that you send a complete report of the progress that has been made under your contract as soon as possible, stating the approximate number of bushels of castor beans that you will offer to the Government under your contract, No. 2579, by March 1, 1919, the approximate shipping dates and quantities of each shipment."

Under date of December 21, 1918, Mr. Edwards, the American consul, sent the petitioner the following cablegram from the Bureau of Aircraft Production:

"Your cable December 5. Contracts department states new prices applicable in United States only. Government will pay \$3 per bushel, Dominican ports, for castor beans accepted or \$4.50 per bushel, ex-dock United States, port duty paid. If you desire to deliver beans to Government at Dominican ports \$3 per bushel, notifying when beans ready for inspection, and quantity."

Under date of December 27, 1918, petitioner sent to Mr. Edwards, for transmission to the United States, the following cablegram:

"Refer to your cable December 21. Price of \$3 per bushel mentioned by you for beans accepted at Dominican ports in regular contract price. Please refer to article third, contract No. 2579, proviso regarding higher price fixed. At time of execution of contract price for contracted beans in States was \$3.50 per bushel. On this basis, price agreed for my beans, Dominican ports, was fixed at \$3. Price has increased in States to \$4.50, and I maintain that I am entitled to proportionate increase on beans delivered Dominican ports. In my contracts with subcontractors I am obligated to pay them any increased price fixed by you. I personally receive no benefit from any increased price fixed. Advisable for you to send representative at once to adjust pending matters. Prompt reply requested."

Under date of January 11, 1919, Mr. Edwards sent to petitioner the following cablegram from the Bureau of Aircraft Production:

"Your 28. No proportionate increased price will be paid Dominican ports. Four fifty per bushel applies only to beans delivered ex-dock in United States, duties paid. Willing to amend contract permitting you to apply beans on contract that are ready for shipment and in warehouses Dominican ports March 1 and that you are able to ship prior to that date. This quantity should be certified by American consul. Will you deliver in United States at new price? If not, cable information previously requested."



Under date of January 13, 1918, petitioner sent to Mr. Edwards, for transmission to Washington, the following cablegram:

"In reply to your cable 10th, also your letter, December 20, will deliver beans in Dominican ports in accordance with price fixed in old contract, reserving all rights to proportionate increase in price. Based on reports received from subcontractors, expect to deliver on or before March 1 approximately ten to twenty thousand bushels. Due notice of delivery will be given you. Refer to your letter, December 19, will await arrival of your representative to further discuss our rights under new contract, formulate estimate of production, etc. Important that he come as soon as possible."

Under date of January 15, 1918, the Bureau of Aircraft Production wrote petitioner as follows:

"Reference is made to Order No. 71683, placed with you January 14, 1918, for castor beans.

"You are advised that the Government desires to close this contract up as quickly as possible and will expect you complete all deliveries thereunder by February 28, 1919."

It appears by letter of March 4, 1919, that petitioner delivered and stored at his warehouses the following beans:

	Bushels.
Santo Domingo City.....	823
San Pedro de Macoris.....	1,331
Sanchez.....	602
Puerto Plata.....	162

It appears also that these beans were afterwards delivered to the United States, but have not been paid for.

6. In the presentation of this claim before this board petitioner asks for a lump sum of \$500,000 in money, upon the theory that the payment of that amount would be a fair and equitable settlement and in the interest of the United States, without submitting any data in detail showing the elements of expense or commitments or other detailed statement of liability upon which such a settlement might be based; the whole claim as thus presented resting upon the theory that petitioner is entitled to a definite profit upon each bushel of beans that might have been delivered under the contract hereinbefore mentioned. It developed at the hearing, however, that certain books and papers were kept by the petitioner which were not presented but which may be made available for inspection, and it must be said also, as adding to the difficulties of the situation, that the petitioner himself was not able to attend the hearing on account of sickness and will probably not be able to attend any hearing, and has given to his brother, Mr. Ulises F. Espailat, a power of attorney with full authority to settle and adjust this claim.

## DECISION.

1. This Board is charged with the duty of exercising the power of the Secretary of War under section 3 of the act of March 2, 1919, which provides as follows:

“That the Secretary of War, through such agency as he may designate or establish, is empowered, upon such terms as he or it may determine to be in the interest of the United States, to make equitable and fair adjustments and agreements upon the termination or in settlement or readjustment of agreements or arrangements entered into with any foreign Government or Governments or nationals thereof prior to November twelfth, nineteen hundred and eighteen, for the furnishing to the American Expeditionary Forces, or otherwise, for war purposes, of supplies, materials, facilities, services, or the use of property, or for the furnishing of any thereof by the United States to any foreign Government or Governments, whether or not such agreements or arrangements have been entered into in accordance with applicable statutory provisions, and the other provisions of this act shall not be applicable to such adjustments.”

In other words, we are to make equitable and fair adjustment of the agreements or arrangements herein found to have been entered into between the petitioner and the United States, upon such terms as may be determined to be in the interest of the United States.

2. First of all, then, we will discuss the conclusions of fact in respect to the agreements or arrangements made between the parties and apply to them the commonly accepted principles of equitable settlement:

(a) *The agreements or arrangements entered into.*—Under date of January 9, 1918, as amended March 8, 1918, and June 19, 1918, there was a formal agreement which obligated the petitioner to plant, cultivate, and harvest during the year 1918, 8,000 acres of land in castor beans in the Dominican Republic and to deliver to the United States from beans produced from said crop or from beans purchased in the open market in the Dominican Republic any quantity up to 500,000 bushels, delivered at the Dominican ports in a shelled condition, and which obligated the Government of the United States to accept all such beans so delivered by March 1, 1919, and pay for the same at the rate of \$4 per bushel; and on October 30, 1918, there was an outstanding informal agreement existing between the same parties by which the petitioner undertook and agreed to cultivate and harvest during the year 1919, 10,000 acres in castor beans in the Dominican Republic, and to deliver at Dominican ports from the crop so produced or from purchases made in Santo Domingo in the open market any quantity up to 625,000 bushels of castor beans, and the Government of the United States undertook to purchase the said beans so delivered and in a hulled condition at the rate of \$4 per bushel.

(b) *Cancellation or suspension of these agreements by the Government of the United States.*—The informal agreement existing between the parties with respect to the growing of 10,000 acres and the delivery of not to exceed 625,000 bushels during the year 1919, was canceled upon the date of the receipt by the petitioner of the letter of November 9, 1918, from Mr. Clement S. Edwards, American consul, in which Mr. Edwards said:

“In reply to yours of October 30, I am instructed to inform you that in view of the changed situation the renewal of present contract 8,000 acres and new contract 2,000 acres can not be made. New price on contract 9.8 cents per pound ex-dock duty paid. No new price paid only on this basis. Will assist you to obtain tonnage if necessary.”

And as of that date the duty rested upon the petitioner to regard this notice as a suspension or a cancellation of the informal agreement entered into on October 30, 1918, and to make no further avoidable expenditures or commitments in reliance upon that informal agreement.

3. This Board is of the opinion, therefore—

(a) That a fair and equitable adjustment of the informal agreement between the Government of the United States and petitioner of October 30, 1918, involves reimbursement to the petitioner for all expenditures or commitments made in good faith and in reliance upon said agreement, and the payment to the petitioner of reasonable compensation for his services in connection with the agreement. This adjustment, in the view of this Board, involves the determination of the liability of the petitioner to any other persons in the Dominican Republic incurred in reliance upon the agreement in accordance with the laws of the Dominican Republic, since it was understood by both parties that the agreements were to be performed in the Dominican Republic. Petitioner contends that he is entitled to profits upon beans that might have been secured under the informal agreement of October 30 but for the cancellation by the Government. While this contention can not be sustained, not only because such damages are not susceptible of legal assessment but because settlement upon that basis, if it were possible, would not necessarily be equitable and fair, yet the possibility that the petitioner might have recouped certain damages out of such profits should be borne in mind when we come to consider the principles upon which an equitable settlement should be made under the formal agreement.

(b) The formal agreement for the planting of 8,000 acres of castor beans in 1918, and the delivery therefrom or from purchases made in the open market of any quantity not in excess of 500,000 bushels of castor beans, was never in terms canceled by the United States. Strictly speaking, therefore, and in a legal sense, the liability of the

Government of the United States, in the absence of any other considerations, would be limited to taking such beans as were tendered and delivered under this contract at the Dominican ports at \$4 per bushel. But the case is not so simple; there are several matters to be considered with a view to making equitable settlement under this formal contract, and the formal contract can not stand alone when we come to consider an equitable adjustment upon the part of the Government in respect to the dealings with petitioner which involve both agreements: (1) Attention must, first of all, be invited to the fact that the undertaking of the petitioner was not simply the purchase and resale of beans, but, in its essence, involved the stimulation by petitioner of the growth of a castor-bean crop in the Dominican Republic and the development of a source of supply of this much-needed commodity for the war purposes of the United States. (2) Attention must also be drawn to the fact that, notwithstanding the cost involved in the formation of petitioner's organization for the carrying on of the enterprise, and the expenditures made in the extensive propaganda for the stimulation of the growth of castor beans in the Dominican Republic, it was not long before petitioner and the Government of the United States realized that the yield from the 1918 crop would be far less than that which had been at first expected, and that if petitioner had been permitted to fulfill the informal agreement of October 30 for the delivery of beans from the 1919 crop, that thereby a large and considerable profit might have been secured by which the expenses incurred in the formation of the organization and in the propaganda which secured the crop might have been recouped. (3) Finally, we must give attention to the fact, when we come to consider the formal contract, that the Government of the United States on November 9, 1918, contended that the new price of \$4.50 per bushel delivered in the United States applied to petitioner's contract; that the United States, by a cablegram of November 24, renewed the same contention; and that finally by a cablegram of December 19 flatly notified petitioner that the increased price for castor beans that had been determined upon applied only to beans in the United States and did not apply to petitioner's contract, and that petitioner was entitled to only \$3 per bushel at Dominican ports; and that petitioner was contending from the time of the receipt of the notification of November 9 that he was entitled to the increase in price fixed for castor beans, and insisting that the increase of \$1 per bushel should be allowed to him in the purchases that he might make under the contract from outsiders or from subcontractors, and was requesting a definite statement as to the price to be paid for castor beans in the Dominican Republic, and at the same time repeatedly stating that the failure of the Government of the United States to give him definite information in respect to that

matter was resulting and would result in serious losses to himself in preventing him from purchasing beans at the increased price to which he was entitled under the contract.

4. In consideration of these facts and in viewing the agreements and arrangements between the petitioner and the United States as a whole, this Board is of the opinion that equity and fair dealing calls for a settlement with the petitioner under the formal contract for the planting and delivery of beans in 1918 upon the same principles of reimbursement and compensation as those heretofore announced with respect to settlement under the informal contract for the delivery of beans in 1919. Such settlement should, of course, involve payment by the Government to the petitioner for all beans delivered by the petitioner to the United States at the rate of \$4 per bushel in petitioner's warehouses in Dominican ports.

5. Having determined certain general equitable principles upon which the two agreements between the petitioner and the United States are to be settled, we come to the question as to the terms upon which it may be said that such settlement is in the interest of the United States. Where reimbursement and compensation form the basis of settlement, as in this case, it is manifestly impossible either to make an equitable settlement or to settle upon terms that may be said to be in the interests of the United States unless the best available information is secured upon which it may be determined what reimbursement should be made or what compensation should be allowed. In this case no list of subcontractors has been filed giving any information as to obligations assumed in that respect, no account of petitioner's own expenditures, and no data upon which there may be a reasonable calculation of expenses or determination of the value of compensation, although it is indicated in the record that petitioner's own books of account may be made available for inspection and the liability to subcontractors may be established by further investigation. In these circumstances this Board is of the opinion that a fair and equitable settlement upon terms that may be said to be in the interest of the United States can not be made unless and until all available evidence and information in respect to expenditures incurred or commitments made upon the faith of the two agreements shall have been furnished this Board for its consideration. This Board can not say that the Government of the United States made any agreement with petitioner which should be applied in such settlement to restrict to petitioner import licenses upon shipments of castor beans from the Dominican Republic to the United States. The matter of the protection of the rights and interests of subcontractors need not now be discussed, but will be reserved for future consideration by this Board.

## DISPOSITION.

1. A copy of this decision will be furnished the petitioner or his counsel, with a view to the submission by him of such evidence as is called for, and this cause will remain open for such further action as may be just and equitable and in the interest of the United States.

Col. Delafield and Maj. Farr concurring.



JUNE 15, 1920.

Case No. 43.

*In re* CLAIM OF BURDETT MANUFACTURING CO. (REHEARING).

1. PURCHASE OF MATERIAL — LOSS SUSTAINED — REIMBURSEMENT.—

Where claimant was induced by officers of the Government to purchase 500,000 pounds of yarn for the purpose of manufacturing 400,000 mop heads for the Government, and where the claimant was given a contract for only 288,000 mop heads, the Government is obligated under the act of March 2, 1919, to reimburse claimant the loss sustained by reason of such purchase.

2. CLAIM AND DECISION.—This claim for \$11,976.81 arises under the act of March 2, 1919, and is presented upon the theory that the Government is obligated to reimburse claimant the loss sustained in the purchase of the yarn. Held, claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

STATEMENT OF THE CLAIM.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$11,976.61, by reason of agreements alleged to have been entered into between the claimant and the United States.

2. The history of this claim may be briefly summarized.

On June 2, 1919, after a hearing, a decision was rendered denying the claimant relief. It is found in Volume I of the decisions of the Board of Contract Adjustment, page 113. An application for a rehearing was denied.

An appeal was taken to the Secretary of War. The claim was referred to Maj. Gen. F. J. Kernan, who made a report recommending that the doubts in the case be removed in favor of the claimant company. The claim was then referred to Hon. Benedict Crowell, Assistant Secretary of War, for decision.

3. Mr. Crowell determines that as to the matter of the authority of Mr. W. B. Mitchell, "he was clearly an officer acting under authority of the Secretary of War within the meaning of the Dent Act." The question of Mr. Mitchell's authority is therefore resolved in the claimant's favor. Mr. Crowell's decision is—

"In order to fully carry out the purpose of the act of March 2, 1919, it is in my opinion necessary that this claimant be granted a rehearing, so that further testimony may be secured as to whether



or not the negotiating officer induced claimant to purchase 500,000 pounds of yarn. It is perhaps unnecessary to say that it is not sufficient to ask the officer whether he 'authorized' the purchase of the yarn. The question whether the officer, by words or acts, induced her to buy the yarn under such circumstances as to constitute a contract, express or implied, that the Government would take it, is to be determined by the Board after finding out as exactly as possible just what occurred at the conference on September 13.

\* \* \* \* \*

"All papers in this case are herewith returned to the Board of Contract Adjustment, with instructions to vacate the findings of fact and decision heretofore entered in this matter and to take further proceedings in accordance with the foregoing memorandum."

#### DECISION.

1. Such facts as are necessary for a decision will be stated under this heading.

The claim as heard *de novo* on March 24, 1920, and the claimant's witnesses testified at length. Mr. W. B. Mitchell was unable to be present on that date and the hearing was continued to April 22, 1920, when Mr. Mitchell was present and was cross-examined by claimant's counsel.

2. The claimant is a corporation located at Kansas City, Mo. Its president is Mrs. M. G. Tomlinson, who acted throughout as the representative of the claimant company.

3. The opening fact is a telegram to the claimant from Washington, dated September 4, 1918, which is quoted:

"Wire quotation 400,000 cotton mop heads, same as mops made by Massasoit Manufacturing Co., Fall River, Mass., their trade name Daisy, weight of mop heads 16 ounces each."

"(Signed) WOOD,  
"Per GRAHAM."

4. Mrs. Tomlinson came to Washington on September 8 and on September 9 called on Mr. Graham, who introduced her to Mr. W. B. Mitchell, to whom was intrusted the buying of mops. He had a requisition for 400,000 mops, which he showed Mrs. Tomlinson. On that day Mrs. Tomlinson produced her samples and some letters of assurance as to her financial position. She stated that claimant's present capacity was 30,000 mop heads per month and that she had facilities either available or that could be secured at once which would increase the capacity to 50,000 mop heads per month.

Mr. Mitchell told her that there was very great difficulty in obtaining material as all the cotton linters had been already bought up. She answered that her mops were made of cotton waste and that she thought she could find a supply. He told her that he would be "tickled to death" to have her handle the contract and that she should go out and see what she could do.

She immediately made inquiries from a number of concerns and found that C. M. Plowman & Co., of Philadelphia, represented by Claude M. Plowman, its president and treasurer, was the agent for the Planters Chemical & Oil Co., which owned a mill in Alabama which could make the requisite amount of yarn.

The price for the yarn which was first named was 50 cents a pound, but later Mrs. Tomlinson and Mr. Plowman agreed on a price of 27 cents for 4-ply yarn and 25 cents for 20-ply yarn. After much discussion Mr. Mitchell and Mrs. Tomlinson agreed on 35 cents as the price for the 4-ply mop heads weighing 20 ounces each. Mrs. Tomlinson testified that they agreed to a price of 30 cents on the 20-ply mop heads, although it was not decided whether the weight should be 16 or 20 ounces.

The agreement as to prices was reached on September 13, 1918.

Up to this point there is no important conflict in the testimony of the two witnesses.

5. Mrs. Tomlinson testifies that on September 13 the prices were fixed and that she told Mr. Mitchell that she had found a reliable mill which would furnish her with the necessary 500,000 pounds of yarn, and that Mr. Mitchell told her to wire the factory to go ahead with work on the 4-ply yarn that we had on hand there, amounting to about 4,000 pounds. Quoting now from her testimony:

"He said that he didn't know or had not decided what size and as soon as he decided on the size he would let it come through, but he told me again to wire the factory on the 4-ply, and then he told me, 'go and get covered.' In talking about the yarn and getting it he said 'go and get covered,' and then I asked him, because he hesitated about that 16-ounce or the 20-ounce—and I said, 'How much shall I get?' and he said, 'Buy all you can get.'"

A call for an additional 100,000 mops was mentioned. Mrs. Tomlinson was told to make three separate bids and to state positively when the first delivery could be made. This was done.

6. Mrs. Tomlinson went to her hotel, called up Mr. Plowman at Philadelphia and gave him a definite order for 500,000 pounds of yarn, 4-ply at 27 cents, and 20-ply at 25 cents.

On September 13, 1918, Mr. Plowman wrote the claimant the following letter:

"(Codes: Lieber's & A. B. C., 5th ed. Shepperson's Cotton Ed., 1878.)

"PHILADELPHIA, PA.,

"160 Chestnut Street, September 13, 1918.

"BURDETT MANUFACTURING Co.,

"Kansas City, Mo.

"GENTLEMEN: Confirming phone conversation with your Mrs. Tomlinson at the Raleigh Hotel, Washington, to-day we have wired our mill to book your order for 500,000 pounds of mop yarn, the

4-ply at 27 cents, and the 20-ply at 25 cents, quality as per sample submitted to Washington. The mill can ship about 30,000 pounds monthly beginning promptly, and later on increase it to 50,000 pounds monthly. The terms are f. o. b. Talladega, Ala., freight collect, net cash 30 days from date of shipment. Your Mrs. Tomlinson is to mail us details of the order from Washington to-day.

"Yours, very truly,

"C. M. PLOWMAN & Co.,  
"Per C. M. PLOWMAN.

"CMP/Ls."

On September 13, 1918, the claimant wrote Mr. Plowman as follows:

"SEPTEMBER 13, 1918.

"C. M. PLOWMAN & Co.,  
"106 Chestnut Street, Philadelphia, Pa.

"(Attention Mr. C. M. Plowman.)

"GENTLEMEN: Confirming telephone conversation with your Mr. Plowman, beg to advise you may enter our order for 500,000 pounds cotton yarn, to be divided somewhat equally in the 4-ply and the 20-ply, as per samples submitted. The 20-ply at 25 cents f. o. b. shipping point, and the 4-ply 27 cents f. o. b. shipping point. We desire this 4-ply put in coils of about 60 ends, and the 20-ply about 30 or 36 end coils. When we get started on this Government contract we can tell more definitely as to ends in each coil which will work to best advantage as to their specified size mop head. This is a matter of minor importance, and we are sure mill will agree to accommodate us as to a few strands more or less per coil.

"It is understood mill will guarantee to ship 30,000 pounds per month at once, and will, upon further notice from us, increase to 50,000 pounds monthly, or, in other words, when we learn definitely the Government's needs.

"We believe the mill had best start first on 4-ply until we can tell more definitely just the amount of each we must have per month. We will advise more definitely when we get our exact specifications.

"Thanking you for attending to this for us, we are,

"Yours, very truly,

"BURDETT MANUFACTURING Co.,  
"By ————, President."

"(Address: 6100 Independence Road, Kansas City, Mo.)"

7. Her testimony as to the interview on September 14 is quoted:

"Then the next day I prepared the bid; I went down to the Treasury Building and Mr. Marks let me have one of his stenographers there to prepare my bids, and then I brought them over to Mr. Mitchell and gave them to him and I told him I had bought the 500,000 pounds and that the mill could furnish it, as he had told me to, and I asked him to look over the bids and see if they were all right, and he looked over them and said they were all right, and that he would put it through in a few days, as soon as he decided on the 20-ply—the size he wanted on the 20-ply."

8. Mrs. Tomlinson went to New York on September 14 and came back to Washington on September 18. On September 19 she called

on Mr. Mitchell and asked him if her contract was ready, and "he said 'No,' that it was not, and he would put it through in a few days, and he thought he would give it all to me. I felt when he said that to me that he referred to this other 100,000 mops." She left on the same day for Kansas City and did not come to Washington again until February, 1919.

9. On September 26, 1918, Mrs. Tomlinson sent Mr. Mitchell a telegram asking leave to use requisition numbers to obtain quick delivery on raw materials, and stating: "As per your instructions, wired factory and we are rushing out 20-ounce 4-ply cotton mop heads."

On October 2, 1918, Mrs. Tomlinson wrote Mr. Mitchell, quoting the September 26 telegram, reporting the installation of new sewing machines and requesting a Government order number.

On October 7, 1918, she sent another telegram asking for information and contract number.

No answer having been received to any of these messages, Mrs. Tomlinson, on October 11, 1918, wrote to Mr. William A. Graham, Chief of the Hardware and Metals Division, asking for shipping instructions and information, and stating that she had found a mill to make mop yarns, with which she had contracted for 500,000 pounds of yarn, and also that the new machinery "to double our output as promised" had been installed.

On October 18, 1918, Mr. Mitchell wrote in reply to the letter of October 11:

"Order for 4-ply 20-ounce mop heads has been issued to your firm and should be received by you at an early date. You will then be at liberty to go ahead on receipt of same."

On October 22, 1918, Mr. Mitchell wrote the claimant as follows:

"1. Reference is made to your letter of October 2.

"2. Contract numbers can be secured by you on receipt of award for 288,000 mop heads, which you will secure through the regular channels of this division in due time."

10. Mrs. Tomlinson stated that the letter of October 22 contained the first mention of the figures "288,000." She had never heard before of a proposed contract or order for that number. She thought that the order of 288,000 mops was a part only of the larger oral contract that had been entered into with Mr. Mitchell.

11. In February, 1919, Mrs. Tomlinson came to Washington, saw Mr. Mitchell, and testifies to the following conversation:

"Mr. Mitchell, you know that you told me to buy that cotton. He said, 'Yes; but I did not know that the war was going to end, and you did not either.'"

12. Mr. Plowman testified, in corroboration of Mrs. Tomlinson, that after some preliminary negotiations he quoted her a price of

27 cents on 4-ply yarn and 25 cents on 20-ply, to be manufactured by the Planters' Chemical & Oil Co., of Talladega, Ala., for whom he was acting; that the inquiry was first for 400,000 pounds, which was increased to 500,000 pounds when it was decided that the mop heads should weigh 20 ounces instead of 16 ounces, and that Mrs. Tomlinson gave him a definite order for 500,000 pounds over the telephone and confirmed the order in writing on the same day. He immediately notified the Planters' Co., which at once made arrangements for new machinery and for a supply of cotton waste.

This portion of the claim was confirmed also by the testimony of Mr. E. L. Goolsby, secretary and treasurer of the Planters' Chemical & Oil Co.

Mr. Samuel H. Marks testified that Mrs. Tomlinson told him on September 13, 1918, that she had landed a contract involving 500,000 pounds of yarn, and that he helped her on September 13 and 14 in writing letters to Plowman & Co. and to Mr. Mitchell.

13. Mr. Mitchell testified that on August 16, 1918, he had a requisition for 400,000 mops; that his total purchases of mops amounted to about one and one-half million; that in August and September, 1918, there was more or less trouble gathering together cotton and in getting mops; and that the Massasoit Mills and other mop makers were getting slow on deliveries, and "I began hustling around to look after a concern which could take care of a contract for 400,000 mops." He caused the telegram of September 4, 1918, to be sent to the claimant and other concerns inviting them to bid on 400,000 mops. He told Mrs. Tomlinson that there was difficulty in getting the materials for the making of mop heads, and that she went out to see what arrangement she could make for getting enough material of the kind required and that she reported that she had found a source from which she could get enough material for the manufacture of the 400,000 mop heads which he required, and that the price was settled between them.

The transcript of his evidence is as follows:

"Mr. MITCHELL. She did not tell the name of the mill. She simply said she had found the mill that could supply all the yarn she wanted.

"Mr. EATON. When she told you that, what did you say to her?

"Mr. MITCHELL. I said, 'Well, the war is still going on; we probably can buy mops later on; but that is all we want for the time being.' I divided them up and gave 112,000 to Massasoit and 288,000 to Mrs. Tomlinson.

"Mr. EATON. Did you say anything to Mrs. Tomlinson, when she told you she had made arrangements by which she could secure the material, as to how many mops she was going to have an award for?

"Mr. MITCHELL. Yes; I mentioned to her that she would get 288,000, and that I had given 112,000 to Massasoit at that time.

"Mr. EATON. Did you say to her in that connection anything about taking steps to be assured of the material?

"Mr. MITCHELL. No; I did not go into that detail, because I had confidence in the Burdett Manufacturing Co. I had looked them up, and found they were reliable people and there would be no difficulty in getting the 288,000; that we would get that; but I did not believe that the mill had the capacity at the time for 400,000, and it never was my intention to place all of it with them. The conversation never followed along that line with Mrs. Tomlinson.

\* \* \* \* \*

"Mr. ADKINS. And before the 21st you are confident you did not say anything to her about the number of mops she would get?

"Mr. MITCHELL. No.

"Mr. ADKINS. Had you told her before the 21st of September that you would give her a contract for any portion?

"Mr. MITCHELL. I told her she would get consideration on the contract; that we would consider her favorably in the matter; and I had thought up to that time of giving her the full amount.

"Mr. ADKINS. Up to what time?

"Mr. MITCHELL. Up to the time of our recommendation for an award, and then I got to thinking it over and going over it with my assistant, and so on, and I said it is too far away, and we will stick to Fall River and have a portion of it done at the Massasoit Mills; and they had their man come down to see me, and they talked about having two additional machines.

\* \* \* \* \*

"Mr. MITCHELL. I said, 'Well, there will be lots of mops coming through; there will be a raft of them that are going to be used.

"Mr. ADKINS. You mean you did not discourage her about buying material?

"Mr. MITCHELL. No; I did not. I did not discourage anybody about buying materials; we had too much trouble getting merchandise.

"Mr. ADKINS. On the contrary, you rather encouraged her?

"Mr. MITCHELL. I would say that. She anticipated and purchased in anticipation of selling more mops to the Government, which we probably would have had to buy if the armistice had not been signed.

"Mr. ADKINS. You fully expected at that time to have to buy hundreds of thousands more mops, did you not?

"Mr. MITCHELL. If the war kept up, there was nothing else to expect but that.

"Mr. ADKINS. And you thought, in your own mind, she would be perfectly safe in buying all the materials she could, did you not?

"Mr. MITCHELL. I don't know. I don't know that I gave her any encouragement for those further than the natural conversation of the trade between buyer and seller. I would have been tickled to death if she had had this cotton on hand long before she *did*. She did a lot of hustling about and was down here three or four times.

"Mr. ADKINS. Did you tell her you would be tickled to death if she had material ready to make mops?

"Mr. MITCHELL. No; I do not think so.



"Mr. ADKINS. I think she used that expression, that in your discussion you said you would be tickled to death if she could get the material on hand for the contract.

"Mr. MITCHELL. We would have been; there would have been no objection to that.

"Mr. ADKINS. There was no objection to telling her?

"Mr. MITCHELL. It might be if she would take that for encouragement. She was anxious for business, and she knew she had got to have the capacity for turning out mops and facilities and increasing production, but that was not on my say so."

14. The bids for the mops were tabulated by Mr. Mitchell. The prices ranged from 31 cents for a rag cotton mop, which was characterized by him as "not suitable quality, poor," to a maximum of 78 cents. He made the following note on the tabulation against the claimant's bid, which is dated September 21, 1918:

"A much better mop than Massasoit, firmer cotton, more absorbent, and worth much more than 1 cent difference; 288,000 all they can take care of; 112,000 balance placed with Massasoit Manufacturing Co., at cost of 34 cents."

15. There are two issues of importance on which the testimony of Mr. Mitchell and Mrs. Tomlinson is not in accord.

Mrs. Tomlinson states that Mr. Mitchell told her to "get covered on the material" and on all she could get. Mr. Mitchell denies having made such a statement.

Mr. Mitchell states that he told Mrs. Tomlinson in an interview in Washington after September 21 that she had been awarded a contract for 288,000 mop heads. Mrs. Tomlinson denies that any such statement was made to her and testifies that she left Washington on September 19 and was not there again until February, 1919.

16. We are satisfied that Mr. Mitchell did not inform Mrs. Tomlinson while she was in Washington that the 400,000 order was to be divided and that she was to have a contract for 288,000 mops only.

An illuminating bit of evidence is a document sent by the Medical Corps to the Quartermaster Corps dated September 17, 1918, containing shipping instructions for the mops and directing that 288,000 should be shipped to Port Newark, N. J., and 112,000 to medical supply depot, New York.

The reason for dividing the order for mops is found in these instructions from the Medical Corps. Mr. Mitchell testified to that effect at the first hearing. He could not have told Mrs. Tomlinson of any such division until after September 17, 1918. He states with positiveness that he did not inform her of the number of mops that were to be awarded her until after September 21, which is the date of his recommendation of awards. We are convinced that Mrs. Tomlinson has stated accurately the date of her leaving Washington, and that she left on September 19.



It is not surprising that Mr. Mitchell should be mistaken on this matter or that his recollection of dates and the sequence of events in the midst of his multitudinous duties should not be as dependable as that of Mrs. Tomlinson.

We find the fact to be that no contract for a less number of mops than 400,000 was suggested to the claimant until the receipt of the letter of October 22, 1918, from Mr. Mitchell.

17. For reasons similar to those stated we have reached the conclusion that Mrs. Tomlinson ordered 500,000 pounds of yarn in obedience to the directions of Mr. Mitchell on September 13, 1918, to "go and get covered." On that date Mr. Mitchell had not learned that the shipping instructions would call for the delivery of 288,000 mops at Newark and 112,000 at New York. The discussion from the time that the claimant was asked to bid on 400,000 mops was confined to a contract for that number. Mr. Mitchell testifies that up to September 21 he had thought of "giving her the full amount." It was on that day that he changed his mind and determined to divide the contract between the claimant and the Massasoit Mills. It is probable that he had forgotten that he had told Mrs. Tomlinson on September 13 to get covered on enough yarn to take care of the entire requisition.

18. There can be no doubt that Mrs. Tomlinson ordered 500,000 pounds of yarn on September 13, 1918, from C. M. Plowman & Co., both over the telephone and by letter, or that the mill received an order for the same amount. Both Mr. Plowman and Mr. Goolsby testified to that effect, and the letters are in evidence. That Mrs. Tomlinson was acting in good faith in ordering enough yarn for 400,000 mops is shown by the testimony of Mr. Marks.

The suggestion that she was taking a chance of getting additional contracts when she ordered 500,000 pounds of yarn is not supported by evidence. On the contrary, the testimony and the record are convincing that she intended to order just that amount of yarn that would enable the claimant to perform a contract for 400,000 mops, which she believed had been definitely though informally entered into.

It is no more than likely that a woman, the president of a small corporation, coming to Washington for no other purpose than to bid on and obtain a contract for mop heads, should remember with exactness the order and the details of the conversations between herself and the Government buyer. He had hundreds of other matters in hand. She had but this one.

He stated that the mills that had been making mops were slow in their deliveries; that there was a shortage of material and difficulty in obtaining it; and that he was pleased to learn that the claimant

had secured a reliable source of supply. It may be that he went further than he intended to go in committing the Government, but no other conclusion can fairly be reached on the whole record than that Mrs. Tomlinson purchased 500,000 pounds of yarn in reliance on the statements of Mr. Mitchell and that she was justified in that reliance.

Relief should be given the claimant for the losses suffered by reason of its purchase of yarn for a 400,000-mop contract so far as it is in excess of that required for a 288,000-mop contract.

19. The claimant should be reimbursed in respect to the amount owed by her to C. M. Plowman & Co., her subcontractor. The evidence is that all of the 500,000 pounds were delivered except 71,166 pounds. The loss claimed by the subcontractor is \$5,269.61. This includes the claim of Plowman & Co. against the claimant and the claim of Planters Chemical & Oil Co. against Plowman & Co.

The amount of the claimant's loss has been largely reduced since the earlier hearing. It is now presented in the form of two statements based on different methods of determining losses. In one the loss is estimated at \$6,927 and in the other at \$6,707. The claimant has used some of the yarn in its business. It alleges that it now has on hand 30,000 pounds of yarn, for which it paid 27 cents a pound, the market price of which is about 15 or 17 cents.

The amount to be paid the claimant corporation should be determined in accordance with the provisions of the supply circulars of the War Department.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase Storage and Traffic Division.

Col. Delafield and Mr. Tanner concurring.

JUNE 15, 1920.

**Case No. 2622.**

*In re* **CLAIM OF ALVORD & SWIFT.**

- 1. DIRECTION TO ORDER MATERIALS.**—The proposal of a contractor and its acceptance by the Government, together with a direction to order necessary materials and to prepare to execute the work, constitute an agreement within the meaning of the act of March 2, 1919.
- 2. PROFIT.**—In an adjustment under the act of March 2, 1919, a claimant is not entitled to any profit.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$816.70, based upon an informal contract for the lowering of a boiler front, grate, etc. Held, claimant is entitled to relief.

Maj. O'Neill writing the opinion of the board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B has been filed under Purchase, Storage and Traffic Division Supply Circular 17, 1919, for \$816.70, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In August, 1918, the claimant submitted to Mr. Frederick C. Wales, then manager of the Planning Division of the Gas Defense Plant, Chemical Warfare Service at Long Island City, N. Y., a proposal to do the following work in connection with the heating plant at Long Island City for the sum of \$6,735:

“Lower boiler front, grates, steel construction for extension furnace, brick work for boiler and extension furnace from floor line, Diamond soot blowers, smoke connection from boiler to the present smoke flue, pipe connection from boiler to present outlets on main and auxiliary main; also all necessary pipe to connect the boiler to the present blow off and feed lines; all necessary fittings, flanges, nipples, gaskets, bolts, hangers, and valves for these connections, automatic stop valve, vigilant feed water controller, all necessary covering on new piping and repairs to covering disturbed on the old piping; also covering of the new smoke connection.”

Pending the issue of formal contract the claimant was directed by Mr. Wales to “order the necessary materials and prepare to execute the work.”

3. The armistice intervening, the work was never commenced but claimant had made expenditures and commitments on which there is now claimed the sum of \$405.71. The remainder of the claim is made up of two items—namely, \$336.75, being 5 per cent on the amount of the contract as General and Administrative Expense, and \$74.24 profit.

DECISION.

1. The proposal of the claimant and its acceptance by Mr. Wales, together with his direction to “order necessary materials and prepare to execute the work,” constitute an informal contract under which the claimant is entitled to reimbursement under the act of March 2, 1919, to the extent of its “expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform” the informal contract.

2. The item of \$336.75 claimed for general and administrative expense, is considered excessive, and the item of \$74.24 for profit can not be paid under the provisions of the act of March 2, 1919.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Chemical Warfare Service, for action in the manner provided in subdivision C, section 5, Supply Circular 17, Purchase, storage and Traffic Division.

Col. Delafield and Mr. Low concurring.

JUNE 15, 1920.

**Case No. 2613.**

*In re* **CLAIM OF GENERAL MANUFACTURING CO.**

1. **JURISDICTION—CONTRACT FULLY PERFORMED.**—Where claimant's formal contract to purchase the waste material at Camp Dix was fully performed on the part of the claimant and the Government and had expired by its own limitation, the Board of Contract Adjustment has no jurisdiction to adjust a claim growing out of such contract.
2. **CLAIM AND DECISION.**—This claim arises under General Orders 103 and is presented upon the theory that the claimant is entitled to the value of certain waste material from Camp Dix under its contract that it did not receive. Held, Board of Contract Adjustment has no jurisdiction to adjust claim.

Mr. Huidekoper writing the opinion of the Board.

This is a claim filed under General Orders, No. 103, War Department, 1918, and arises out of a formal contract for the purchase of waste material at Camp Dix, Wrightstown, N. J. Claimant alleges the Government failed to deliver to it all waste material called for by its contract. Claimant asks for a construction of the contract, that the Government deliver to it all the waste material falling within the terms of said contract as so construed, and also pay to claimant all money derived from the sale of waste material from said camp during the period mentioned in said contract. Claimant's claim is for an indefinite sum of money and an indefinite quantity of waste material.

**FINDINGS OF FACT.**

1. A formal contract was entered into between claimant and the United States on the 28th day of August, 1917, in relation to the removal of waste material from Camp Dix, Wrightstown, N. J., which contract, by its terms, expired June 30, 1918. The contractor agreed to pay for such waste material the sum of 5 cents per month for each soldier and each person in the Government service at said camp during at least one-half of the month for which payment is made. In return for this payment the contractor was to remove all waste material produced at Camp Dix, with certain exceptions mentioned in said contract. The contract provides:

"1. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, manure, and cinders from Camp Dix, Wrightstown, N. J.

"2. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation to be designated by the commanding officer in charge."

2. By petition filed with this Board on April 17, 1920, claimant alleges that shortly after the contract was executed and after the contractor began performance a question arose as to the meaning in the first paragraph of the contract of the words:

"All waste matter of every kind and nature, except rags, bags, manure, and cinders."

3. By said petition claimant further alleges:

"4. In accordance with the terms of the contract, the contractor paid to the United States of America the sum of 5 cents per month for each soldier and each person in Government service at said camp during the entire period covered by said contract, and demanded that there be delivered to said contractor waste materials, with the exception of rags, bags, manure, and cinders, as the same accumulated at said camp, but the United States of America and the commanding officer in charge at Camp Dix and his subordinate officers each and all refused and failed to either deliver to said contractor or to permit it to receive and have large and substantial quantities of waste material of various and sundry kinds and descriptions, other than rags, bags, manure, and cinders, and there accumulated, as your petitioner is informed, believes, and charges, at Camp Dix during the period covered by said contract, to wit, the period between August 28, 1917, and June 30, 1918, in addition to many other articles of waste material, the exact number of which is not within the knowledge of this petitioner, but is within the knowledge of the United States of America, the following specific articles of waste:

	In excess of—
Auto radiators.....	30
Barrels.....	500
Cases.....	500
Knives.....	25
Auto parts.....pounds..	50,000
Baling wire.....do....	75,000
Brass, including light yellow, red, heavy yellow, and turnings.....do....	1,500
Composition.....do....	1,000
Condemned oats, corn, and other foodstuffs.....do....	75,000
Copper, light and heavy, and including wire, insulated and uninsulated.....pounds..	1,200
Horseshoes.....do....	8,000
Hose.....do....	1,000
Aluminum, all kinds.....do....	1,000
Inner tubes, all kinds.....do....	1,000
Iron, all kinds.....do....	250,000
Leather, scrap and miscellaneous.....do....	3,000
Lead, all kinds.....do....	1,000
Nails.....do....	500
Roachings, mane and tail.....do....	750
Rubber, exclusive of tires.....do....	15,000
Steel, all kinds.....do....	100,000
Stoves, plates, and grates.....do....	50,000
Tires, auto.....do....	5,000
Tires, motor-cycle.....do....	2,000
Tubing, all kinds.....do....	1,000

4. The petition alleges that during the performance of this contract a question of construction arose as to the meaning of paragraph marked "1" of said contract. It appears there was no dispute as to what said contract meant, for on June 25, 1918, Jos. J. Martin, the president of the claimant company, wrote Capt. Champlin, Quartermaster Corps, Camp Dix, Wrightstown, N. J., as follows:

"According to our contract with the Government for the removal of all waste material we are entitled to all waste excepting rags, bags, manure, and cinders. Now, I have learned through other sources that some of the contractors are making claims on other kinds of refuse and waste material at the different cantonments.

"Now. I have two of these contracts, including your own, and I want to go on record as stating that there was no intention on my part that I was entitled to anything other than the raw fat, cooked fats, bones, garbage, paper, tin cans, bottles, and dead horses, and trap grease, and I know that Lieut. Col. J. Austin Ellison when he made the deals for the contracts had no thought of items other than above stated. He did not word the contracts, as I was there when mine were written, and I have talked to him since, and I know that he is under the same impression that I am, that we are not entitled to them.

"I am giving you this letter that I don't want the Government to think for a minute that I would hold them up to any such a proposition as this, as I am looking to the reclamation and to save the Government all that I can.

"I hereby release all articles not specifically mentioned on the contract."

5. The contract in question expired on June 30, 1918, and it does not appear that claimant made any claim thereunder until it filed its present petition with the Board of Contract Adjustment on April 17, 1920, a period of about 22 months after the expiration of the contract. It conclusively appears from the record in this case that the claimant made no protest during the performance of this contract that it was not receiving all the waste material called for by said contract, but, on the contrary, it is evident claimant acquiesced in the construction placed on the contract by the United States and accepted the waste material in full satisfaction of its contract and made the monthly payments therein provided. The contract was fully performed and completed both by the United States and claimant, without any question or doubt or dispute being left open by the parties for future determination.

6. Claimant, by paragraph 4 of its petition above quoted, alleges upon information and belief that there accumulated between August 28, 1917, and June 30, 1918, many articles of waste material in excess of a specified amount, which in said petition is set forth, but said petition fails to show and there is no proof in the record before this Board that any of the articles therein enumerated were waste materials. The very nature of the items named would not, of itself, sug-



gest that said articles were waste materials, and further action on the part of Government officials would be necessary before said property could be designated "waste material."

On August 29, 1917, the date of this contract, the sale of Government property used by the Army was regulated by section 1972 of the Compiled Statutes, which reads as follows:

"The President may cause to be sold any military stores which upon proper inspection or survey appear to be damaged or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

The Secretary of War by sections 678, 679, and 680 of the United States Army Regulations prescribed the manner in which sales of public property shall be made, and these regulations require that an inspection or survey be made and property condemned before being sold. It has been held that there is no authority to sell or dispose of Government-owned material until the required procedure is had.

#### DECISION.

1. Claimant in its petition refers to and relies on decision of this Board in the claim of Henry Knight & Son (Inc.), No. 1736, but the facts set forth in that case are entirely different from the ones here presented. In the Knight case it appears that claimant and the Government officials were in doubt as to the meaning of the clause, "All waste matter of every kind and nature except rags, bags, manure, and cinders," and that pending the construction of said clause certain waste matter was, with the consent of the claimant, either segregated or sold and the money realized on the sale was held by the Government as a stakeholder, with the consent of the claimant, pending the construction of said clause, and thus the amount became liquidated; or where the material was segregated, the Government held possession of the waste material pending the determination. The only question in that claim was one of construction of a formal contract, and when that was determined the Government was in a position to either deliver the money or the waste material to the claimant.

2. In this case no such proceeding was taken and, so far as the record discloses, the Government did not hold any money or waste material pending the construction of said clause. If the Government has withheld or sold any of the waste material here claimed, it is not alleged to have done so with the consent of the claimant. The amount here claimed is wholly undetermined. If the Government failed and refused to deliver to claimant all waste material called for by its contract, claimant would have a cause of action

against the Government for a breach of the contract, in which action claimant could recover all damages it sustained. Of such a claim we have no jurisdiction.

3. The record in this case shows that the agreement out of which the claim arises was a formal contract executed in accordance with the law, which has been fully performed by the parties, and has expired by its own limitation. The Secretary of War is therefore without jurisdiction to settle or adjust this contract or make a supplemental agreement, and the claimant's remedy, if any, is by resort to a court having jurisdiction.

#### DISPOSITION.

A final order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.

JUNE 16, 1920.

Case No. 2428.

*In re* CLAIM OF CARLISLE COMMISSION CO.

1. **FREIGHT RATES—CONSTRUCTION OF CONTRACTS.**—Where purchase orders provided for hay or straw f. o. b. Kansas points, taking 37½-cent rate to group 3, Texas points, there was no obligation on the claimant to pay freight rates, or any increase in rates caused by delay in shipments for which claimant was not in fault. The words "taking 37½-cent rate to group 3, Texas points" are merely descriptive of the territory to which the hay was to be shipped.
2. **DELAY—WAIVER.**—Where the purchase orders called for deliveries within 30 days and deliveries were delayed by failure of railroads to furnish cars, requests by the Government for deliveries and acceptance thereof is a waiver of such delays.
3. **CLAIM AND DECISION.**—Claim under General Orders, 103, for \$1,087.22 deducted from price of hay; Held, claimant entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

#### FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders, No. 103, War Department, 1918, and is for \$1,087.22, upon formal contracts.
2. The Carlisle Commission Co., of Kansas City, Mo., dealers in hay, straw, and grain, received through the Quartermaster Corps, Chief of Forage Branch, United States Army, various purchase orders covering shipments of hay and grain. The said purchase orders were issued on various dates from February 25, 1918, to June 14, 1918, and called for hay or straw f. o. b. Kansas points, taking 37½-cent rate to group 3, Texas points, delivery within 30 days of the date of each order.
3. By the terms of these orders the Government was to pay the freight from point of origin to point of destination.
4. On June 25, 1918, the rate of freight from Kansas points, taking 37½-cent rate to group 3, Texas points, was advanced by the Railroad Administration to 47½ cents.
5. Owing to the congestion, there had been great delay on the part of the railroads in furnishing cars for the shipments, and the loading of certain cars of each order was so delayed that the advanced

rate of 47½ cents was charged on same instead of the old rate of 37½ cents.

6. Some of the cars were shipped after the expiration of the 30 days called for in the orders. The same were accepted by the Government, but in paying for same the Government deducted from the settlement with the shipper the difference between the 37½ cents and the rate under the new tariffs. The shipper protested against said deduction, but the zone board disallowed the claim of the shipper and shipper appealed to this Board.

#### DECISION.

1. Under the terms of the contracts the hay and straw in question was to be delivered to the Government f. o. b. loading points, and the provisions in said contract "f. o. b. Kansas points, taking 37½-cent rate," are only geographical designations indicating a certain general locality from which the hay and straw was to be shipped, and when claimant loaded the hay upon cars at the points so indicated his obligation was completed. The claimant was not to pay the freight; he did not contract or obligate himself for the freight to destination. His contract was a stipulated amount for the hay f. o. b. cars at the loading points indicated.

2. The evidence shows that in most instances had the hay or straw been delivered to the carriers within the 30 days specified in the contract, then such delivery would have been in time to have enabled the Government to secure the benefit of a lower freight rate to points of destination, but the evidence also shows that the Government knew of the delay, knew that the delay was from causes beyond the control of the shipper, and that the Government insisted that the hay should be shipped regardless of the delay, and that it accepted said hay when so shipped. Such acceptance by the Government of the hay operates under the law to waive any breach by reason of delay made by the contractor. The Government had the right to have refused the hay or straw on account of the delay of the shipper, but it did not do so. It demanded the delivery after the expiration of the time of the contract and accepted same.

3. The evidence also shows that the price at which the hay and straw had been purchased was much below the market price prevailing after June 25, 1918, and that the Government obtained every advantage by waiving the failure of the shipper to forward the hay within the time specified.

4. For the reasons above the Board is of the opinion that the claimant is entitled to receive the full amount of the contract price for such hay as was accepted by the Government.

5. These contracts, however, being formal and having been fully completed by performance by the claimant, the Secretary of War is without jurisdiction to adjust same by supplemental agreements.

6. This Board is of the opinion, however, that claimant should be reimbursed, and recommends that these claims be transmitted to the Auditor for the War Department with a copy of this opinion for adjustment.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for action in accordance therewith.

Col. Delafield and Mr. Averill concurring.

JUNE 16, 1920.

**Case No. Sales BCA-9.**

***In re* CLAIM OF WESTERN PIPE AND MACHINERY CO.**

1. **JURISDICTION.**—Under a validly executed contract for the sale of certain material by the Government to a contractor, the function of the Secretary of War is complete when the material has been delivered. Accordingly, this Board has no jurisdiction of a claim for payment of freight equalization provided in the contract, which is a matter for the Treasury Department to adjust.
2. **CLAIM AND DECISION.**—Claim presented under General Orders, 103, to adjust a dispute based upon a validly executed contract for the sale by the Government to claimant of iron pipe. Held, no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under General Orders, 103, to adjust a dispute arising out of a delivery by the Surplus Property Division, Office of the Director of Purchase and Storage, to claimant of 5,449,557 pounds (as stated by claimant) of black pipe, miscellaneous, located at Norfolk, Va. This claim was received by this Board from Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

A hearing has been had upon this claim.

**FINDINGS OF FACT.**

1. On November 4, 1919, Maj. William Wilson, jr., of the Office of the Director of Sales, Purchase, Storage and Traffic Division, held at request of the Ordnance Salvage Board an informal public auction in the office of the Ordnance Salvage Board, Washington, D. C., for the sale of all surplus iron pipe located in the various districts of the Ordnance Department, stated to be approximately 3,200 tons. Among the conditions of sale it was stated by Maj. Wilson that the pipe was to be sold on an f. o. b. Pittsburgh basis; that bids were to be made as though all pipe was physically located at Pittsburgh; that on material located elsewhere the freight rate from the point of location and delivery to Pittsburgh would be deducted from the amount of the bid.

2. Claimant made the highest bid and was awarded the entire quantity, at \$81.75 per net ton.

3. The estimate of 3,200 tons was computed from the reports of the 14 ordnance districts. Within two weeks of the auction sale

claimant called to the attention of the Ordnance Salvage Board the fact that there was a large shortage in the amount actually on hand in the various ordnance districts, due to the fact that certain districts had failed to deduct quantities which had been previously sold or transferred for use by other branches of the Government. The Ordnance Salvage Board then endeavored to secure pipe from the Surplus Property Division, Office of the Director of Purchase and Storage, so that it could deliver the amount offered at the auction sale.

4. A formal contract covering this sale was executed by the claimant and the Ordnance Department dated December 2, 1919, providing in part as follows:

"ARTICLE I. *Material to be sold.*—The United States shall sell and deliver to the purchasers and the purchasers shall purchase and pay for approximately 1,500 net tons (of 2,000 pounds each) of welded iron and steel pipe, said pipe not to include expansion bands and coils, upon the following terms and conditions:

"ART. II. *Inventory.*—The locations and approximate quantities of said pipe shall be in accordance with a schedule attached to and made part of this contract. It is understood and agreed, however, that the locations and quantities therein set forth are subject to correction by the United States so as to show actual locations and quantities, and are not guaranteed by the United States as to accuracy.

"Should additional quantities of the pipe above described be declared surplus by the War Department before February 1, 1920, all such quantities shall be sold to and purchased by the purchasers under the terms and conditions of this contract.

"ART. VI. *Contract price.*—The contract price to be paid to the United States by the purchasers for the material included in this contract shall be at the rate of \$81.75 per net ton delivered f. o. b. Pittsburgh, Pa. Upon any material loaded at points other than Pittsburgh, freight equalization based on the Pittsburgh rate shall be allowed the party entitled thereto, and shall be paid or deducted at the proper monthly-settlement."

The contract was drawn for the reduced tonnage of 1,500 tons approximately in order that claimant might be able to make his 10 per cent deposit and issue shipping instructions on the pipe, and the matter of additional quantities was covered by article two.

5. As a result of the negotiations between the Ordnance Salvage Board and the Surplus Property Division, 370,125 feet of black pipe, the property of the Surplus Property Division at Norfolk, were declared surplus.

6. On December 2, 1919, by the Surplus Property Form No. 13 the Surplus Property Division authorized the Surplus Property Office at Newport News, Va., to deliver to claimant "370,125 feet of black pipe, miscellaneous, located at Norfolk, 2,762.56 tons net, \$81.75 per net ton f. o. b. cars Pittsburgh basis, for the sum of \$225,839.28, Pittsburgh basis, by contract with Ordnance Department signed by



Maj. A. C. Hindman on December 2, 1919, to which the tonnage applies."

7. There were delivered to claimant by the various ordnance districts from 1,500 to 1,800 tons of pipe. Claimant paid the Ordnance Department in each shipment the amount determined by deducting from the bid price of \$81.75 per net ton the freight rate per net ton from the point of loading and delivering by the Ordnance Department to Pittsburgh.

8. There were delivered to claimant at Norfolk, Va., by the Surplus Property officer, Newport News, Va., 5,449,657 pounds (as stated by claimant) of pipe. In reply to claimant's question as to method of payment, Maj. Brown of the office of the zone finance office, Newport News, Va., instructed claimant to pay in full for each car as it moved \$81.75 per net ton and then at the end of the month to submit the total bill and he, Maj. Brown, would make the deduction, forward it to Washington and claimant would receive check for the amount to be deducted as freight rate from the \$81.75 paid. Claimant paid for each car in accordance with these instructions submitted a statement of shipping weights but has not been paid the amount of the freight rate from Norfolk to Pittsburgh.

#### DECISION.

1. It is the opinion of this Board that the delivery of 5,449,557 pounds (as stated by claimant) of pipe to claimant by the Surplus Property office at Newport News, Va., was a delivery under the terms of and as a part of the tonnage stipulated in the contract between claimant and the Ordnance Department dated December 2, 1919.

2. The tonnage delivered to claimant by the various ordnance districts has been paid for by claimant and no claim is here made as to those deliveries.

3. The delivery of the subject matter of the contract has been accomplished, the title thereto has been passed to claimant and there remains nothing to be done but the adjustment of the money payments under the terms of the contract.

4. It is the opinion of this Board that thereafter the adjustment of the money payments under the contract is not the function of the Secretary of War but pertains to the powers of the Treasury Department or of the courts.

5. This Board is therefore without authority to grant the relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 16, 1920.

Case No. 2674.

*In re* CLAIM OF CONCRETE STEEL CO.

1. **JURISDICTION.**—Agreements by agencies outside the War Department and not for a War Department purpose. Where the claimant furnished steel bars to a contractor, who was building barges for the United States Railroad Administration, and there was no contractual relation between claimant and the Government; and there is no evidence to show that the Railroad Administration was acting as the agent of the Secretary of War or of the President for War Department purposes; or that the barges were intended, or used for War Department purposes, this Board is without jurisdiction to adjust said claim.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$15,613.60 for steel bars furnished prime contractor. Held, no jurisdiction.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Supply Circular No. 17 by reason of an alleged agreement between claimant and an agent of the President of the United States.

STATEMENT OF FACTS.

1. On or about July 13, 1918, a formal written contract was entered into between G. A. Tomlinson, as Federal manager of the New York and New Jersey Canals, United States Railroad Administration, and Caldwell-Marshall Co. for the construction of four reinforced barges for the Railroad Administration.

2. Sometime thereafter the claimant company entered into an agreement with the Caldwell-Marshall Co. to furnish it certain steel bars to be used as reinforcing material in the construction of the barges and made deliveries thereof to the value of some \$15,000 for which it does not appear to have been paid.

3. Thereafter the Caldwell-Marshall Co. fell into financial difficulties and was unable to carry out its contract with the Railroad Administration, as a result of which the Railroad Administration took over the performance of the contract and completed the barges into the construction of which the steel furnished by claimant appears to have entered.

4. The contract between the Railroad Administration and the Caldwell-Marshall Co. provided that the reinforcing steel bars and rods should be supplied by the Government and that all materials and parts entering into the construction of the barges should become the property of the Government. The particular reinforcing steel involved in this claim appears to have been furnished by claimant through direct arrangement with the Caldwell-Marshall Co., although claimant alleges that this was done on the strength of representations made by officials of the Railroad Administration as to the credit of the Caldwell-Marshall Co.

5. The claimant having been unable to obtain payment for the materials furnished from the Caldwell-Marshall Co., presents this claim on the theory that it was induced by oral representations of officials of the Railroad Administration to supply the materials to the Caldwell-Marshall Co. on credit, and also that under existing statutes the Railroad Administration was required by law to exact of the prime contractor a bond for the protection of material men in the claimant's position. That no such bond was required, as a result of which the claimant has been denied legal protection to which it was entitled and is unable to enforce its rights against the barges, because attachment of Government property, such as this, is prohibited by law. That as a result of the foregoing acts of the representatives of the Railroad Administration there has arisen an agreement, express or implied, within the provisions of the act of March 2, 1919, whereby claimant is entitled to recover the value of the material furnished which has become property of the United States Government and of which the United States Government has derived the benefit and use.

#### DECISION.

1. The evidence in this case does not establish such state of facts as will bring this claim within the terms of the act of March 2, 1919. There is no evidence of any express agreement in the case between claimant and any Government official; and as to any transactions between claimant and the Government from which an agreement might be implied there is no evidence that in its relations with claimant the Railroad Administration was acting as the representative of the Secretary of War or of the President for War Department purposes. It rather appears that the construction work to which the claim relates was for general transportation service purposes, and there is nothing to show that the barges were intended for the use of the War Department or were actually used by that department. The jurisdiction of the Secretary of War under the act of March 2, 1919, being limited to the adjustment of agreements

entered into by his agents directly or by agencies of the President for War Department purposes, this Board is without jurisdiction to adjust this claim in the absence of evidence bringing the claim within the foregoing jurisdictional limits.

DISPOSITION.

1. An order denying relief will be entered.  
Col. Delafield and Mr. Hope concurring.

JUNE 16, 1920.

**Case No. 266.**

*In re* **CLAIM OF LESTER AUSTERN.**

1. **MATERIALS—COMMITMENTS.**—Where claimant has incurred no expenses and made no commitments between the date of an oral order to proceed with the manufacture of raincoats and the date he learns that the oral contract has been suspended, there is no obligation upon the Government under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim for \$24,405.78, under the act of March 2, 1919, for expense incurred in preparing to manufacture raincoats. Held, upon rehearing claimant not entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case was originally filed before this Board as a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919.

2. On the 29th day of September, 1919, this Board rendered a decision in which the relief asked for by claimant was denied.

3. From the decision of this Board claimant appealed to the Secretary of War, and on February 9, 1920, the Secretary of War handed down an opinion in which he held as follows:

"It is accordingly ordered that the Board give this claimant an opportunity to prove the amount of his alleged losses on the findings purchased for this contract, together with any rent or other proper items of overhead expense accruing during the period between the date of the verbal order from Capt. Vaughan and the date claimant learned in Washington that action on the proposed formal contract was suspended. The evidence disclosing no specific agreement prior to June, 1918, the decision is otherwise approved."

4. In accordance with the decision of the Secretary of War, a portion of which is above quoted, this Board, on June 9, 1920, gave claimant a rehearing in order that he might prove any expenditures between the date of the verbal order from Capt. Vaughan and the date claimant learned in Washington that action on the proposed contract was suspended.

5. The evidence in the original hearing discloses, and it is not controverted at any place, that the alleged verbal order from Capt. Vaughan was given to claimant in the Hotel Martinique, New York City, on Saturday, June 8, 1918.

6. At the original hearing, claimant testified:

"Mr. AUSTERN. \* \* \* 'I came immediately to Washington. \* \* \* And they told me their hands were tied and they could not do anything.'

\* \* \* \* \*

"Maj. KENNY. 'And to find out why, you came to Washington?'

"Mr. AUSTERN. 'Yes, sir.'

"Maj. KENNY. 'You were told that their hands were tied and they were not making any orders?'

"Mr. AUSTERN. 'Yes, sir.'"

7. In the hearing on June 9, 1920, the claimant substantiates the testimony given in the original hearing—that he came to Washington during the week following the order of Capt. Vaughan on June 8, 1918.

8. The evidence fails to disclose that claimant made any expenditures whatsoever between June 8, 1918, the date of the verbal order given by Capt. Vaughan, and the following Saturday, June 15, 1918, upon the faith of said order.

9. Between the date of the decision of the Secretary of War and the date of the hearing, this board caused to be made by its technical section, acting through Mr. W. R. Robertson, certified public accountant, a report upon the expenditures made by claimant and for which he is here claiming reimbursement. The audit of claimant's books shows that the expenditures which Mr. Austern testified in the original hearing were made upon the faith of the order of Capt. Vaughan, and which testimony is quoted in the opinion of the Secretary of War, were made on or about September 9, 1918. As to expenditures for rent and other proper items of overhead, the evidence discloses that the rent was payable monthly; that all expenditures for salaries, etc., during the week June 8 to June 15 were regular expenses which had been continuing for some time prior to the conversation with Capt. Vaughan and were not made upon the faith of Capt. Vaughan's order.

#### DECISION.

1. The claimant having failed to show that it made any commitments or incurred any expenses between the *date of the verbal order from Capt. Vaughan and the date claimant learned in Washington that action on the proposed formal contract was suspended*, this board is of the opinion that claimant is not entitled to any relief whatsoever.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 16, 1920.

**Case No. 749.**

*In re* **CLAIM OF WESTERN REDUCTION CO.**

- 1. ASSUMPTION OF RISK—OPINIONS OF GOVERNMENT REPRESENTATIVES.**—Where claimant in undertaking the manufacture of certain products and in erecting facilities for such purpose was influenced partly by the opinions of Government representatives as to the future needs of steel manufacturers, and was also given advice on certain engineering questions by such representatives, it must be held that claimant assumed the entire risk of the undertaking, and that there was no agreement within the meaning of the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$113,003.94 based upon an alleged agreement in relation to the manufacture of ferromanganese and ferrochrome. Held, claimant is not entitled to relief.

Mr. Howe writing the opinion of the board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Supply Circular No. 17 by reason of an agreement alleged to have been entered into between claimant and a representative of the Secretary of War.

A hearing was held June 9, 1920.

**STATEMENT OF FACTS.**

1. Claimant is a corporation of the State of Oregon, organized in April, 1918, for the manufacture of the metal alloys known as ferromanganese and ferrochrome. The organizers and principal stockholders are Mr. J. H. Haak and his brother, Mr. C. E. Haak.

2. During the spring of 1917 the requirements of the United States Government for manganese and chromium in the commercially usable forms of the alloys, known as ferromanganese and ferrochrome, became great and insistent, owing to the use of these metals in the manufacture of steel. At the same time the supply of these metals and alloys in this country was very small, owing to the fact that before the war practically the entire supply had been furnished by importation from foreign sources. What manufacturing of these materials was taking place at this time appears to have been done by a limited number of producers under circumstances which did not conduce to the best results in respect of conservation of ores, liberality of



output, and facility of distribution to the steel plants throughout the country.

3. Under these circumstances the Bureau of Mines of the Interior Department undertook propaganda in respect of these minerals, having in view on the one hand the conservation of the supply of manganese and chrome ores in this country, and on the other hand the stimulation of the manufacture of alloys from these ores, but only by manufacturers who were not at the time in the business; but also in greater quantity by manufacturers actually operating and located conveniently to existing steel plants. For this purpose the Interior Department sent to Seattle Mr. F. C. Ryan, who was charged with the duty of locating sources of supply of manganese and chromium ores, stimulating and encouraging the manufacturer on the Pacific coast of alloys, and attempting to see that this manufacture was conducted by processes most conducive to conservation of existing ore supplies. Mr. Ryan worked in close cooperation with the Oregon State Mining authorities and reported to Mr. Thomas Varley, his immediate superior on the Pacific coast, who in turn was acting under the general direction of Dr. Dorsey A. Lyon, of the Bureau of Mines in Washington. None of these officials appear to have been charged in any way with the purchasing of any ores or alloys for the Government or for Government contractors, or specifically authorized to conduct any negotiations looking to contractual relations with the Government. As far as their official authority appears, it seems to have been limited to efforts to conserve the supplies of ore and to encourage the manufacture of alloys through assistance by means of advice and information of a general nature, but up to at least until the fall of 1917 it seems to have been the policy of the Interior Department not to permit its representatives in this locality to furnish specific operating advice to individual manufacturers, the department being desirous of avoiding any usurpation of the legitimate business field of practicing commercial metallurgical engineers.

4. During June of 1917 Mr. J. H. Haak, who up to that time had been engaged in the lumber business, becoming acquainted through publications in mining trade journals of interviews with various Government officials of the requirements of the Government for manganese and chrome alloys, got in touch with Mr. Ryan and consulted him as to the facts in this respect, the opportunities for commercial production of these alloys, the attitude of the Government toward persons who would undertake to produce them, and the prospects for disposition of the product. Mr. Ryan appears to have told Mr. Haak that these alloys were badly needed, that the needs of the Government were apparently almost unlimited, that he was in Seattle for the purpose of encouraging their manufacture by the most efficient methods,

furnished him the names of responsible steel manufacturers who Mr. Ryan thought would need these materials, and to have done everything he felt justified in doing within his authority to encourage Mr. Haak to go into the manufacture of these alloys, as a matter not only of patriotism but of good business. Claimant does not contend that Mr. Ryan made any specific promises, either as to contracts or market, or gave claimant any specific directions as to the kind of plant it should build, or the installation of any special facilities to produce the alloys, although it was apparently understood that Mr. Ryan favored the kind of manufacturing process which claimant finally adopted.

5. To paraphrase Mr. Ryan's own expression as to his attitude toward Mr. Haak throughout their interviews, Mr. Haak appeared to him like a man who was standing on the bank uncertain whether to make the dive, and Mr. Ryan went so far as to tell him that, knowing the conditions surrounding the business, if he personally were in Mr. Haak's position he would go into the business as a matter of both patriotism and commercial possibility, and that he said this with the purpose of gently shoving him in.

6. After these interviews with Mr. Ryan, Mr. Haak began the construction of a plant for the manufacture of ferromanganese and ferrochrome by the electrolytical process, purchasing his ores from outsiders. This plant was in operation by October, 1917, when it was discovered that the electrodes in use were unsatisfactory. Mr. Haak then appealed again to Mr. Ryan for advice in this connection. By that time Mr. Ryan had been authorized from Washington to give advice to specific individual manufacturers, and he told Mr. Haak that the electrodes in use should be changed if waste of ore was to be avoided. About this time also Mr. Haak seems to have discovered that the size of the plant as built was insufficient for production on a profitable commercial basis. This defect was apparently attributable to misjudgment on the part of Mr. Haak's constructing engineer.

7. Thereupon Mr. Haak employed a new engineer and made plans to increase his plant and to manufacture his own electrodes at the cost of a considerably increased investment. As a result of this the plant was idle until April of 1918. About this time the claimant, Western Reduction Co., was incorporated by Mr. Haak and his brother and succeeded to their interests and obligations in connection with this enterprise.

Before embarking on this extension of his operations Mr. Haak came to Washington and had a talk with Mr. Lyon for the purpose of satisfying himself more accurately as to the attitude of the Government as respected affording manufacturers a market for their output. It seems that for some time there had been under discus-

sion in Congress a bill which was supposed to be intended to protect the manufacturers of these alloys by preventing competition from imports and guaranteeing a market for a period after the war. What took place at this conversation between Mr. Haak and Mr. Lyon is not altogether clear, but as a result of it Mr. Haak seems to have left with the impression that either through the passage of the bill or otherwise the Government would undertake to protect the market, and felt justified in completing his plans for the enlargement of his plant and borrowing money for the purpose and also in entering into a lease of a chrome mine to afford him a supply of chrome ore. These steps were taken and operations pushed, but before the business had reached a profitable basis the armistice intervened, and the consequent fall in demand for the output made further operations impossible.

8. The claim is for the outlays and commitments which claimant and the Haak brothers incurred for the purpose of manufacturing the alloys in question. It is based on the theory that the representations, stimulation, and encouragement received from the articles published in the mining trade journals and from Mr. Ryan, Mr. Varley, and Dr. Lyon, under the circumstances under which they were made and acted on, gave rise to an agreement, express or implied, on the part of the Government to afford claimant a market for its output, which meant practically the output of the plant that claimant, in fact, constructed, since the size and character of this plant was known to these officials. This agreement is related back in time to June of 1917, when Mr. Haak had his first interview with Mr. Ryan. The subsequent interviews with Mr. Varley and Dr. Lyon are relied on as confirmatory of the agreement reached in June, 1917.

9. No written contract or order for any of its output was ever received by claimant from the Government. Claimant did make some sales of ferromanganese to a commission house representing steel manufacturers, but appears to have had no dealings as respected actual sales with any Government officials. Although the manufacturers in question were corporations which it is well known were engaged at that time upon Government contracts, there is no evidence sufficient to trace claimant's product into any specific war munitions or into any particular Government contract with which the Secretary of War had anything to do, though it seems safe to say it was used for some sort of war purpose.

#### DECISION.

1. A careful consideration of the evidence presented in this claim does not reveal any agreement, express or implied, between claimant and any Government official within the meaning of the act of March 2, 1919. There is no doubt that the needs of the Government for

ferromanganese and ferrochrome were matters of common knowledge at the dates involved in this case, and that the Government was endeavoring to encourage their production. It also seems clear that the officials with whom claimant had its dealings were authorized to stimulate this production in every practicable way, but there is nothing to show that they had been given any authority to enter into any contracts or to make any promises or representations looking to that end, and these limits of their authority seem to have been understood by claimant. There is nothing in the evidence to show that these officials said or did anything that could be construed as a promise or from which any intention to make an agreement could be implied. The whole tenor of the evidence is to the effect that the discussions between claimant and these officials related simply to the question whether such an enterprise as claimant contemplated would be one that would be useful to the Government and commercially profitable to the claimant, and that claimant throughout was not seeking at all to effect any contractual relations with the Government, but only to ascertain the opinions of presumably well-posted men as to whether its contemplated project offered a reasonable chance of commercial success in order to decide the matter for itself. In response, claimant received opinions and nothing more. If they were sufficiently definite and persuasive to induce claimant to make the plunge, and were followed by advice and assistance in its operating difficulties, these transactions still can not be interpreted as amounting to anything more than this. The publications in the trade journals did not amount to promises, even assuming they had been authorized publications of the Government, of which there is no evidence, and claimant's idea that the Government undertook to afford it a market through congressional legislation seems to rest on nothing more substantial than the opinion of various persons outside of Congress that legislation, if finally enacted, would have that effect. Dr. Lyon clearly was in no position to promise such undertaking, and it is not established that he tried to.

2. On the whole, the evidence seems to show clearly that claimant, as the result of its own investigations, was fully advised of all the circumstances surrounding the business which it proposed to undertake, and that it entered upon this enterprise and made the expenditures it did as a business risk in the exercise of its own judgment and not on the strength of any representations from any Government official from which any obligation on the part of the Government can be derived.

#### DISPOSITION.

1. An order denying relief will be entered.  
Col. Delafield and Mr. Hope concurring.

JUNE 16, 1920.

Case No. 2669.

*In re* CLAIM OF IRETON BROS.

1. **FORMAL CONTRACT—JURISDICTION—REMEDY.**—Where a claim grows out of a formal contract claimant has no remedy under the act of March 2, 1919.
2. **SAME—CONTRACT TERMINATED BY BREACH.**—The Board of Contract Adjustment has no jurisdiction under the act of March 2, 1920, to adjust a claim growing out of a contract that has been breached.
3. **CLAIM AND DECISION.**—This claim for \$1,054.53 is an appeal from the Classification Claims Board and is presented upon the theory that the United States Government is obligated to compensate claimant for loss sustained by reason of the delay in giving shipping instructions relating to a quantity of onions purchased from the claimant. Held, Board of Contract Adjustment has no jurisdiction.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On September 12, 1919, this claim was forwarded by the Auditor of the War Department to the Classification Claims Board with the following statement:

“I am inclosing herewith all papers on file in this office in the claim of Ireton Bros., of Lima, Ohio, there being no record of a formal contract having been executed for consideration in connection with the act of Congress of March 2, 1919, and the Comptroller's decision of April 16, 1919, construing said act.”

On May 14, 1920, the Classification Claims Board considered this claim under the Dent Act and denied relief upon the merits, from which decision appeal has been taken to this Board.

2. The claimant's loss was suffered under the following circumstances:

On or about February 14, 1918, the War Department advertised for bids on 100,000 pounds of onions, to be delivered at Camp Wheeler, and 38,000 pounds of onions to be delivered at Camp Sheridan. Claimant submitted bids, and under date of February 25, 1918, a letter of acceptance was issued by the depot quarter-

master, Atlanta, Ga., covering the Camp Sheridan bid. This letter reads in part as follows:

"Under the proposal submitted by you in response to advertisement of this office as above, award is hereby made to you for furnishing and delivering the following-named supplies, or performing the following-named services, as stipulated in the proposal, and in conformity with the usual conditions and the terms of the advertisement. \* \* \*

"The article or services and time and place of delivery or performance are as follows: 38,000 pounds of onions, as per specifications, at \$1 90 per cwt., f. o. b. Camp Sheridan, Ala.

"Deliveries to be as required by the camp quartermaster, during the month of March, 1918."

Under date of March 1, 1918, a letter of acceptance was issued by depot quartermaster, Atlanta, Ga., covering the Camp Wheeler bid. This letter reads in part as follows:

"SIRS: Under the proposal submitted by you in response to advertisement of this office, as above, award is hereby made to you for furnishing and delivering the following-named supplies, or performing the following-named services, as stipulated in the proposal and in conformity with the usual conditions and the terms of the advertisement.

\* \* \* \* \*

"The articles or services and time and place of delivery or performance are as follows:

"Approximately 100,000 pounds of onions, as per specifications, f. o. b. Camp Wheeler, Ga., at \$1.73 per hundredweight.

"Deliveries to be as required by the Camp Quartermaster during the period from March 1, 1918, to March 30, 1918."

3. During the month of March, 1918, the Camp Sheridan quartermaster called for 20,000 pounds of onions, and the Camp Wheeler quartermaster called for 60,000 pounds of onions; claimant shipped the amount so called for and has been paid for same. No further calls were made in the month of March, and the claimant had on hand at the end of that month 40,000 pounds of onions for delivery to Camp Wheeler and 18,000 pounds for delivery to Camp Sheridan. In the latter part of March claimant requested that shipping instructions covering these amounts be given him. In reply to this request claimant received on April 1, 1918, the following telegram, signed "Goethals, Subsistence":

"Ask quartermaster Camp Hancock when he desires further shipment of onions. Camps Wheeler and Sheridan can not use any more onions from you. Will have to arrange for you to ship them Camp Wadsworth, Spartanburg. Will advise you definitely Thursday regarding shipment to Wadsworth."



The above wire was followed on April 3, 1918, by the following telegram, signed "Goethals, Subsistence":

"Reference wire yesterday, "Goethals, Subsistence," regarding shipment onions Camp Wadsworth, find that camp has surplus on hand and can not use further onions this month. Will advise you later what disposition to make of surplus you are holding on contract."

On April 7 claimant wired Goethals, Subsistence:

"Onions will all spoil in few days if you do not give shipping instructions to ship on our March contract."

On April 19, 1918, claimant again wired Goethals:

"Have two cars onions sold subsistence division for March shipment. Can you not order to near-by camp? Sprouting and deteriorating, and to prevent total loss should be moved at once."

On April 19 claimant received the following answer, signed "Goethals, Subsistence":

"Re telegram 19th. You are to furnish 30,000 pounds onions to Camp Greene, Charlotte, N. C., and 32,000 pounds Camp Taylor, Louisville, Ky., at \$1.73 per hundred delivered. Camp quartermasters will advise you when to ship."

On April 20, 1918, claimant received following telegram from the Camp Taylor quartermaster:

"In compliance with telegraphic instructions Quartermaster General's Office, dated April 19, 1918, under proposal for furnishing onions fresh as required in quantities at \$1.73 per hundredweight at Camp Zachary Taylor, Dumesnil, Ky., during the calendar month of May, 1918, is accepted."

Under date of April 23, 1918, claimant received from Camp Greene quartermaster a call, which reads in part as follows:

"Call is hereby made upon you under your contract dated ——— day of ———, 191—, for furnishing and delivering f. o. b. cars at Camp Greene, Charlotte, N. C., in addition to all previous calls on this contract for the ——— enumerated below, to be delivered as stated: Onions, dry, 30,000 pounds, to arrive at Camp Greene not later than May 2."

4. On or about April 30, 1918, claimant shipped 30,000 pounds of onions to Camp Greene and 30,000 pounds of onions to Camp Taylor. Claimant introduced evidence that the onions when shipped were in sound condition. On arrival at the above-mentioned camps the onions were badly spoiled and decayed and were accordingly rejected.

5. While no formal petition has been filed, claimant's letters, affidavit, and testimony show that the claim is based upon the theory that the Government was obligated by the acceptances of February



25 and March 1 to call for definite quantities of onions during the month of March; that calls for the full amount were not made during March, but, on the contrary, late in April, to wit, April 20 and 23; that these calls were made pursuant to the acceptance of February 25 and March 1, and that the arrival of the onions in an unacceptable condition was the direct result of the Government's failure to make calls or give shipping instructions in accordance with the contracts of February 25 and March 1; and that as a result the 60,000 pounds of onions were a total loss, for which claimant asks compensation in the sum of \$1,054.53.

#### DECISION.

1. The claimant does not contend that the onions in question were received in an acceptable condition, but alleges that failure to deliver sound onions was due wholly to the Government's failure to make calls and give shipping instructions during the month of March, as stipulated in the letters of acceptance of February 25 and March 1, 1918. Obviously this claim must be predicated upon the theory that the calls made on April 20 and April 23, 1918, were made pursuant to and as a part of the agreements entered into on February 25 and March 1. Furthermore, this position is borne out by the correspondence, which shows that the Government finding itself unable to use during the month of March the full amount of onions for which it had contracted on February 25 and March 1 delayed calling for 58,000 pounds of same until late in April, at which time it made call and changed the delivery point.

2. An examination of the letter of acceptance of February 25 and March 1 discloses the fact that these instructions call for delivery within 60 days and involve the sums of \$722 and \$1,730, respectively; accordingly these agreements are within the provisions of Compiled Statutes, paragraph 6853b, and are contracts executed in accordance with law. As such, claimant has no remedy under the act of March 2, 1919, known as the Dent Act.

3. It further appears that the agreements of February 25 and March 1, 1918, have been terminated by breach; accordingly the Secretary of War and this Board have lost jurisdiction and can afford no relief.

Col. Delafield and Mr. Fowler concurring.

JUNE 16, 1920.

Case No. 2635.

*In re* CLAIM OF H. MUELLER GRAIN CO.

**1. FAILURE TO DELIVER—PURCHASE OF DEFICIENCY—SETTLEMENT.—**

Where claimant contracted to sell and deliver 5,000,000 pounds of hay to the Government at a stipulated price per hundredweight, and failed to deliver a portion thereof, necessitating the Government's purchase elsewhere, the Government has a right under the express terms of the contract to deduct from the amount due the claimant for hay delivered the amount paid by the Government in excess of the contract price for such hay as it was obligated to purchase by reason of the failure of the claimant to deliver the amount sold.

- 2. CLAIM AND DECISION.—**This claim for \$2,096.02 is an appeal from a decision of the Claims Board, Settlement Division, Office of the Director of Finance, and arises under the act of March 2, 1919, and is presented upon the theory that the Government has failed to compensate claimant for hay delivered under an informal contract. Held, claimant is not entitled to relief sought.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,096.02, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On September 18, 1917, the claimant wrote the depot quartermaster at Fort Sam Houston, Tex., proposing to deliver 8,000,000 pounds of No. 1 prairie hay, at prices ranging from \$1.05 per hundred pounds to \$1.35 per hundred. This offer was accepted in the following letter of September 19, 1917, as to 5,000,000 pounds:

“(464.4-145.)

SEPTEMBER 19, 1917.

“From: Department quartermaster.

“To: H. Mueller Grain Co., San Antonio, Tex.

“Subject: Award of contract.

“1. Confirming telephone of even date, award under opening of 18th instant is made you as follows:

\* \* \* \* \*

“One million (1,000,000) pounds No. 1 prairie feeding hay at one dollar five cents (\$1.05) f. o. b. San Antonio and one dollar ten cents

(\$1.10) f. o. b. El Paso per one hundred pounds; one million (1,000,000) pounds at one dollar seven and one-half cents (\$1.07½) f. o. b. San Antonio and one dollar twelve and one-half cents (\$1.12½) f. o. b. El Paso per one hundred pounds; one million (1,000,000) pounds at one dollar ten cents (\$1.10) f. o. b. San Antonio and one dollar fifteen cents (\$1.15) f. o. b. El Paso per one hundred pounds; one million (1,000,000) pounds at one dollar eighteen cents (\$1.18) f. o. b. San Antonio and one dollar twenty-three cents (\$1.23) f. o. b. El Paso per one hundred pounds; one million pounds (1,000,000) at one dollar twenty-one cents (\$1.21) f. o. b. San Antonio and one dollar twenty-six cents (\$1.26) f. o. b. El Paso per one hundred pounds.

"2. Your proposal and this letter of acceptance will constitute contract.

"3. Calls will be made by this office.

"4. Deliveries must be made strictly in accordance with calls from this office, and supplies must conform strictly to your quotations and Government specifications. Any deviation from specifications or delay in making deliveries will be sufficient reason for this office to cancel entire award and buy elsewhere.

"By direction:

"W. A. TRUMBULL,  
"Major, Q. M. Corps, U. S. R."

3. In accordance with paragraph 3 of the quoted letter, calls were made on the claimant by the depot quartermaster calling for the delivery of substantially all of the 5,000,000 pounds which were contracted for. Deliveries should have been made within 30 days after September 19, 1917. Shortly after October 19, 1917, the claimant was informed by the quartermaster that he was short in his deliveries. He maintained that he had delivered in full. It was not until some months afterwards that the exact number of pounds that had been delivered was determined. It now appears that the following deliveries were made:

Deliveries at—	Pounds.
\$1.05 hundredweight.....	979, 523
1.07½ hundredweight.....	333, 440
1.10 hundredweight.....	1, 034, 261
1.18 hundredweight.....	1, 044, 489
1.21 hundredweight.....	990, 708
Total.....	4, 382, 421

There was a cancellation of the call for hay at \$1.10 per hundred-weight, amounting to 25,771 pounds.

4. The Government bought hay in the latter part of October for delivery in November and December, 1917, for which it had to pay \$1.42 per hundred pounds. It appears that this price was the fair market price.

5. The United States has deducted from the amount due the claimant the sum of \$2,096.02. Its calculations are based on the difference

between the contract price for the undelivered hay and the price which the Government was obliged to pay.

DECISION.

1. The terms of the award are—

“Any deviation from specifications or delay in making deliveries will be sufficient reason for this office to cancel entire award and buy elsewhere.”

2. The entire award was not canceled. The Government bought elsewhere enough hay to make up the shortage in deliveries which the claimant should have made. The ordinary rule of damages is that the claimant is liable for the difference between the market price for hay and the contract price. This is the rule that obtained in this case and it is the rule which has been followed by the Government in making its deductions. We see no reason to overrule or change it. It is stated by the Government that after deducting \$2,096.02 there is due the claimant the sum of \$88.77. The claimant has refused to accept this amount. The determination of this Board is that the claimant is entitled to \$88.77 and no more.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the recorder of the Classification Board, Settlements Division, Office of the Director of Finance, with the suggestion that payment should be made to the claimant of the undisputed balance of \$88.77 and no more in accordance with its determination.

Col. Delafield concurring.

JUNE 16, 1920.

Case No. 1915.

*In re* CLAIM OF MADDOX TABLE CO.

1. **MISTAKE AS TO NUMBER OF ARTICLES ORDERED.**—Where claimant had a contract for the manufacture of a certain number of propellers and was ordered to ship five propellers for a certain purpose and thereupon wrote a letter to the effect that it understood that this was an additional order but was immediately informed by telegram that the five were to apply on the original contract. Held, that there was no agreement within the meaning of the act of March 2, 1919, whereby the Government is obligated to compensate claimant for loss caused by this mistake.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$420, based upon an alleged agreement for the manufacture of propellers. By its decision of February 9, 1920, this Board held that claimant was not entitled to relief. On appeal to the Secretary of War the claim was remanded to this Board for the taking of further testimony. Held, on rehearing, that claimant is not entitled to relief.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, was filed with the Air Service Claims Board in accordance with Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, on June 28, 1919. It was presented to the Board of Contract Adjustment, in the original instance, on an appeal from the decision of the Air Service Claims Board. The claim is for \$420, and arises by reason of an agreement alleged to have been entered into between the claimant and the United States on the 17th day of June, 1918, for the manufacture of five airplane propellers. A hearing was had before this Board on January 26, 1920, and thereafter, on February 9, 1920, by its decision the relief prayed for in claimant's petition was denied. From this decision the claimant took an appeal to the Secretary of War, and the claim has been returned by the Secretary of War to the Board of Contract Adjustment for further consideration and proceedings upon the following recommendation:

"Upon consideration of the record presented it is directed that further proceedings be had in accordance with the attached recommendation of the special advisers."

Said recommendation is as follows:

"The petition for review in this case should be considered as an appeal from the order of the Board of Contract Adjustment denying claimant's petition for a rehearing.

"The decision of the Board is based on testimony of the Government inspector at claimant's plant, to the effect that the propellers for the making of which compensation is here sought were manufactured before the order was received. Claimant was not represented at the hearing, and therefore there was no cross-examination of the Government inspector, and no evidence on behalf of claimant except the affidavits submitted with its claim.

"Immediately upon being informed of the decision of the Board the claimant requested a rehearing, and stated that its failure to appear and produce witnesses at the hearing was due solely to the fact that it had no notice that the Government contended that the propellers had been manufactured otherwise than pursuant to the written order set forth in petitioner's claim, and therefore deemed it unnecessary to incur the expenses of procuring the attendance of witnesses at Washington.

"Claimant then offered to present its superintendent, Mr. Belknap, as a witness as to the facts set forth in claimant's petition and to submit such additional evidence as to the actual date of cutting propellers as is in claimant's possession. Claimant's verified petition for a rehearing sets forth that prior to the hearing petitioner was unaware that its allegations were controverted and did not anticipate any contest of the claim. The petition for the rehearing was denied.

"After a careful examination of the record we recommend that the Board be instructed to grant claimant an opportunity to present further evidence in support of its claim.

"G. H. DORR,  
"R. C. GOODALE,  
"Special Advisers."

A further hearing of this case was held by this Board on June 4, 1920.

2. The circumstances out of which this claim arises are as follows: Prior to June 17, 1918, the claimant was engaged in the manufacture of 250 airplane propellers for the Curtiss OX-5 engines. These propellers were being made under Procurement Order No. 20564 and a formally executed contract, No. 2750, dated February 4, 1918, covering the purchase order. The claimant was in production, but had not completed the full number of propellers required under the contract, by reason of the failure to get the proper kind of lumber.

3. On June 17, 1918, claimant received from the Director of Aircraft Production a communication signed by F. M. Sibley, of the propeller section, which is here quoted:

"1. This office has been requested to arrange for the shipment of five propellers to be used for exhibition purposes at different county fairs.

"2. Inasmuch as your company is the only one at this time manufacturing 8-25 design, it is requested that you prepare five propellers of this type to be manufactured in exact accordance with specifications, but with the exception of your trade-mark.

"3. Shipping instructions will then be issued immediately for the forwarding of these propellers as directed."

To this letter the claimant replied, on June 22, 1918, as follows:

"We acknowledge yours of the 17th instant requesting us to enter order for five propellers, 8-25 design, which we infer are to be manufactured from oak same as those covered by our order 20564, contract No. 2750.

"We understand this is in addition to the quantity covered by the above-named contract and will proceed at once with the manufacture of same.

"Will we be furnished with a separate order and contract number to cover this additional order?"

Upon receipt of this letter the Director of Aircraft Production wired to claimant, on June 24, 1918, as follows:

"Re letter 22d. Five propellers to be furnished for exhibition purposes to apply on original order. Shipment must be made within one week."

And upon the same date wrote to claimant as follows:

"1. In reply to your letter of June 22, this office wired you to the effect that five propellers to 8-25 design which are to be used for exhibition purposes at different county fairs throughout the country were to be furnished on original order No. 20564.

"2. Further, it is quite necessary that these propellers be ready for immediate shipment, as this office has been requested to see that the same are forwarded by the first part of next week at the latest. Shipping instructions will be forwarded by our Mr. Jones.

"3. Immediately upon receipt of this kindly advise, giving the exact status of the matter."

In reply to the foregoing letter the Director of Aircraft Production received the following:

"Acknowledging yours of the 24th instant, just at hand, in reply to your wire of the 24th we wired you as follows: 'Rewire date sending shipping instructions and bills lading. Shipment will follow immediately.'

"We have in this morning's mail advice from the Production Department, propeller section, signed 'C. S. Jones,' instructing us to ship to Lieut. Walker, Signal Corps, General Supply Depot, Washington, D. C., who states that the propellers are expected to reach Washington on or before July 15.

"With this short date for delivery, we should have your advice to make shipment by express. Will you advise us by wire concerning this, and see also that B/L for the shipment are provided that we may not be delayed.

"MADDOX TABLE CO."

After the receipt of the first communication, dated June 17, 1918, and on either June 18 or 19 claimant alleges that it cut the material



necessary for the five propellers, and proceeded to finish them in accordance with the specifications contained in the purchase order and contract. The entire order of 250 propellers was manufactured and delivered by claimant under shipping instructions from the United States. No shipping instructions beyond those contained in the letter to claimant from C. S. Jones, referred to in the letter above quoted, were received for the five propellers, which were finished, and, according to the testimony of Mr. H. P. Belknap, of the claimant company, were ready for delivery some time in the month of July. These propellers are now on hand at the plant of claimant and are the basis of this claim.

4. There appeared on behalf of claimant, Axel Berg, who was in charge, on the 17th day of June, of all the lumber and all cutting of lumber at the claimant's plant, who testified that on the 17th or 18th of June he received oral instructions from Mr. Belknap, the factory superintendent, to get out lumber enough for six blades (propellers); that the lumber was gotten out and cut into proper sizes and dimensions on the same day; that the order was received. Belknap testified, in effect, that the five propellers intended for delivery under the order of June 17, and which were not to carry the claimant's trade-mark, were not made up from the lumber cut on June 18 or 19, but were taken from the propellers in course of manufacture and which were in the finishing rooms on that date. The propellers made from the lumber cut on June 18 or 19 were to replace the five so taken, in order to fully complete the number of propellers required under the contract.

#### DECISION.

1. The governing question in this case is whether or not the letter of June 17, 1918, from the Director of Aircraft Production to claimant should be construed as an independent order for five propeller shafts, separate and distinct from those called for under contract No. 2750, or whether the intention of the Director of Aircraft Production was to include the order of June 17 in and to be applicable against the formal contract. The letter of June 17, 1918, would seem to indicate that the intention of the United States was to place with claimant an additional order for five propellers. However, this impression was corrected by the telegram and confirmation letter of June 24, in which the true intent of the United States was expressed.

2. However, it is the contention of the claimant that, upon the faith and authority of this letter (June 17) it produced the propellers. In the face of the communication of June 24 was this action

justified by the circumstances? A brief review of the evidence will aid us in our conclusions.

3. It is not clear when the manufacture of the five propellers was begun. The testimony of both Belknap and Berg is that the material from which these propellers were made was cut on either the 18th or 19th of June, following the receipt of the alleged order, and that the propellers were completed in July following. The impression sought to be created by this evidence is that the claimant lost no time after the receipt of the alleged order, but entered into production immediately. However, this contention of the claimant is defeated by the letter of June 22 from claimant to the propeller section of the Bureau of Aircraft Production, in which it is specifically stated:

"We understand this is an addition to the quantity covered by the above-named contract, *and will proceed at once with the manufacture of same.*"

Thus we are confronted with two contradictory statements emanating from practically the same source. Without criticizing or questioning the truth of the statements made by either Mr. Belknap or Mr. Berg, we are inclined to view the statement contained in the above-quoted paragraph as being indicative of the true situation. This letter was written at the very time of, or shortly after, the receipt of the alleged order, and it is a fair assumption that a statement made at or near the time of the receipt of the order would present more nearly the true situation than would the testimony of witnesses, credible though they are, whose testimony is based upon an ability to remember accurately events which transpired nearly two years ago. The inference is that the production of these propellers was not begun until June 22 or some date thereafter. But, assuming, for the sake of argument, that the claimant actually relied upon the alleged order and entered into production prior to June 22, and with the further assumption before our minds that from two to three weeks was required to finish a propeller, was the claimant justified in completing these propellers after the receipt of the letter and telegram of June 24? Both the letter and the telegram above referred to were couched in plain, unambiguous terms such as permitted of no misconstruction, and were sufficient to put at rest any misunderstanding into which claimant might have been led by the letter of June 17. The telegram specifically states that the propellers for exhibition purposes *were to apply on the original order*, and the letter goes one step further and sets out specifically the number of the order. Clearly, there can be no room to doubt but what the claimant was, in the face of this telegram and letter,

put upon notice that the five propellers *were not an additional order*, and that no additional purchase order or contract would be issued or tendered to claimant therefor. Our conclusion is that the claimant, in so completing the propellers, did so upon its own responsibility and without authority, and must assume the losses, if any, occasioned thereby. That claimant was thoroughly cognizant of the fact that it was building these propellers upon its own responsibility and without authorization from the United States, is evidenced in a letter dated September 11, 1918, from claimant to the Pittsburgh Aircraft Co., Pittsburgh, Pa., and which was through error delivered to the Pittsburgh Branch of Aircraft Production and which is now a part of the record in this case. This letter was written prior to the filing of this claim with the Air Service Claims Board, and is as follows:

"We recently completed a contract with the Government *for six propeller blades for Curtiss OX-5 engines and have a few surplus blades, perfect, which by mistake we made in excess of the order*; also a few that in some minor particulars did not comply with all specifications when finally completed.

"We have been advised that in some instances you have purchased some of these blades, and beg to inquire if you are in the market at this time for any of this type, and if so, the price you would pay for same..

"Very truly, yours,

"MADDOX TABLE CO."

It will be noted that the language of this letter is, "We \* \* \* have a few surplus blades, perfect, which by mistake we made in excess of the order." This statement clearly indicates either one of two things—that after the receipt of the letter and telegram of June 24, 1918, wherein the claimant was specifically advised that the order for five propellers was to be included under the purchase order No. 20564, the claimant completed the propellers with the view of using them as replacements in case of rejections; or, in the absence of that contingency, of selling them in the open market. It appears that, failing in both of its purposes, claimant now seeks to recoup from the United States such losses as it may have incurred by reason of its failure to be guided by the expressed intention of the United States. A contract comes into being only upon an offer and an acceptance, and the acceptance must be in the precise terms of the offer. In the case at bar there are no facts which, to our minds, constitute either an offer or an acceptance. The United States at no time intended to make a new contract with the claimant for these five propellers. The impression which might have been created by the letter of June 17 that it did, being subsequently corrected, the claimant should have governed its actions accordingly. If claimant relied

upon what it thought was a new contract and incurred expenses for labor and materials after the advices of June 24, it did so at its own peril, and the United States is not responsible to claimant in any amount whatsoever.

For the foregoing reasons the relief prayed for will be denied.

DISPOSITION.

The Board of Contract Adjustment will enter a final order denying relief.

Col. Delafield and Mr. Marcum concurring.

JUNE 16, 1920.

Case No. 2616.

*In re* CLAIM OF PRODUCTS MANUFACTURING CO.

1. **JURISDICTION.**—Where the claimant had a formal contract for the purchase and removal of waste material from an army camp, which has been terminated by regular expiration of time and been fully performed by both parties, the Secretary of War has no jurisdiction to settle a claim that claimant had not received all the material he was entitled to, which was first asserted 20 months thereafter. Case of Henry Knight & Son distinguished.
2. **CLAIM AND DECISION.**—Claim under General Order 103 on formal contract for undelivered material on waste contract. Held, claimant not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

This claim is filed under General Orders, 103, War Department, 1918. Claimant makes claim under formal contracts for waste materials produced at Camp Upton, Yaphank, Long Island, and at the embarkation cantonment, Tenaflly, N. J., which the United States failed to deliver to it. Claimant asks for a construction of the contracts, and in the event any of such waste materials have been sold by the United States that the United States pay to it the money derived from said sale. Claimant's demand is for an indefinite sum of money and an indefinite quantity of waste material.

FINDINGS OF FACTS.

1. Formal contracts were entered into between the claimant and the United States on the 31st day of August, 1917, in relation to the removal of waste material from Camp Upton, Yaphank, Long Island, and from the embarkation cantonment at Tenaflly, N. J., which contracts expired on June 30, 1918. By the terms of these contracts the contractor agreed to pay 5 cents per month for each soldier and each person in Government service at the respective camps during at least one-half of the month for which payment was made. In return for this payment the contractor was to receive all waste material produced at said camps, with certain exceptions mentioned in said contracts. The contract relative to Camp Upton, Yaphank, Long Island, reads in part as follows:

“1. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, manure, and cinders, from Camp Upton, Yaphank, Long Island.

"2. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation to be designated by the commanding officer in charge."

The contract covering the embarkation cantonment at Tenaflly, N. J., contains identically the same language as is above quoted from the contract covering Camp Upton, with the exception that in lieu of the words in the last clause of parargaph 1, which read, "from Camp Upton, Yaphank, Long Island," there have been inserted the words, "from embarkation cantonment, Tenaflly, N. J."

2. By petition filed with this Board on April 17, 1920, claimant alleges that shortly after the contract was executed, and after the contractor began performance, a question arose as to the meaning in the first paragraph of the contracts of the words "all waste matter of every kind and nature, except rags, bags, manure, and cinders."

3. By said petition claimant further alleges:

"4. In accordance with the terms of the contracts, the contractor paid to the United States of America the sum of 5 cents per month for each soldier and each person in Government service at both of said camps during the entire period covered by said contracts and demanded that there be delivered to said contractor waste materials with the exception of rags, bags, manure, and cinders as the same accumulated at each of said camps, but the United States of America and the commanding officer in charge at both of said camps and their subordinate officers each and all refused and failed to either deliver to said contractor or to permit it to receive and have large and substantial quantities of waste material of various and sundry kinds and description other than rags, bags, manure, and cinders, and there accumulated, as your petitioner is informed, believes, and charges, at each of said camps during the period covered by said contract, to wit, the period between August 31, 1917, and June 30, 1918, in addition to many other articles of waste material the exact number of which is not within the knowledge of this petitioner, but is within the knowledge of the United States of America, the following specific articles of waste:

	In excess of—
Auto radiators	50
Barrels	750
Cases	750
Knives	50
Auto parts	80,000 pounds
Baling wire	100,000 do
Brass, including light yellow, red, heavy yellow, and turnings	2,000 do
Composition	1,500 do
Condemned oats, corn, and other foodstuffs	60,000 do
Copper, light and heavy, and including wire, insulated and uninsulated	1,800 pounds
Horseshoes	10,000 do
Hose	1,200 do
Aluminum, all kinds	1,200 do
Inner tubes, all kinds	1,500 do
Iron, all kinds	275,000 do
Leather, scrap and miscellaneous	3,000 do
Lead, all kinds	1,800 do



	In excess of—
Nails-----pounds--	750
Roachings, mane and tail-----do----	600
Rubber, exclusive of tires-----do----	17, 000
Steel, all kinds-----do----	120, 000
Stove plates and grates-----do----	60, 000
Tires, auto-----do----	6, 100
Tires, motor-cycle-----do----	2, 400
Tubing, all kinds-----do----	1, 200

"The foregoing list of articles is an estimate and the tabulation of articles is based upon the best information available to this petitioner, and it is believed that there accumulated at each of said camps during the period covered by the contracts hereto attached, in excess of the number of each article designated.

"6. \* \* \* That it (claimant) is and at all times since the execution of the aforesaid contracts was by the clear terms of the contracts entitled to 'all waste matter of every kind and nature, except rags, bags, manure, and cinders,' which accumulated at each of said camps between August 31, 1917, and midnight of the 30th of June, 1918, now offers to accept in settlement of this controversy such articles of waste as accumulated at each of said camps during the period covered by said contracts, if said articles are now in the possession of the United States of America, and in the event any or all of said articles have been disposed of, your petitioner, said contractor, Products Manufacturing Co., offers to accept in lieu of such articles, if any, as may have been disposed by the United States of America the amount received by the United States of America for such articles, if any, as may have been disposed of by the United States of America."

4. By letter dated May 20, 1920, H. P. Kimball; captain, Quartermaster Corps, executive officer at Camp Merritt, N. J., which is the camp within the embarkation cantonment at Tenafly, N. J., states:

"You are advised that there are no records on file in this office which would indicate the number, kind, and quantity of waste material that accumulated at this camp between August 31, 1917, and June 30, 1918, except rags, bags, manure, and cinders."

5. By letter dated May 14, 1920, H. L. Butler, lieutenant colonel, Quartermaster Corps, camp supply officer, Salvage Division, Camp Upton, N. Y., states:

"Reference your letter under date of May 10, 1920, file No. 150-C-2616, you are advised that all records at camp headquarters, and this office, pertaining to the subject matter, have been searched and there is no information on file, other than a copy of the original contract between the War Department, represented by Lieut. Col. C. R. Krauthoff and the Products Manufacturing Co. for the period of time between August 21, 1917, and June 30, 1918."

6. The contracts in question expired June 30, 1918, and it does not appear that claimant made any claim thereunder until it filed its present petition with the Board of Contract Adjustment April 17, 1920, a period of about 22 months after the expiration of the contracts. Although the petition recites that a question of construction as to the meaning of paragraph 1 of the contracts arose shortly after



the claimant commenced performance, from the investigation made herein it would appear that no record was entered or made of any protest on the part of the claimant. Admitting, however, claimant did protest it was not receiving all the waste material called for by its contracts, it accepted the quantity allotted to it by the Government officials, and made the monthly payments required by the contracts. The record does not show but what the claimant acquiesced in the construction placed on the contract by the United States, and accepted the waste material allotted to it in full satisfaction of its contracts. The contracts were fully performed and completed, both by the United States and claimant, without any question or doubt or dispute being left open by the parties for future determination.

Claimant's claim is for an indefinite sum of money and an indefinite quantity of waste material. In paragraph 6 of its petition, above quoted, claimant alleges that it now offers to accept in settlement such articles of waste material as accumulated at each of said camps during the period covered by the contracts, if the articles are now in the possession of the United States, and in the event any or all of such articles have been disposed of claimant offers to accept in lieu thereof the amount received for same. The letters of Lieut. Col. Butler and Capt. Kimball state there are no records which would indicate any waste material accumulated at their respective camps between August 31, 1917, and June 30, 1918. The conclusion is inevitable that claimant received all the waste material to which it was entitled, and that its offer of settlement is of no avail.

7. Claimant, by paragraph 4 of its petition above quoted, alleges, upon information and belief, there accumulated between August 31, 1917, and June 30, 1918, many articles of waste materials in excess of a specified amount, which in said petition is set forth, but said petition fails to show, and there is no proof in the record before this Board, that any of the articles therein enumerated were waste materials. The very nature of the items named would not of itself suggest that such articles were waste materials, and further action on the part of Government officials would be necessary before such property could be designated waste material. On August 31, 1917, the date of this contract, the sale of Government property used by the Army was regulated by section 1972 of the Compiled Statutes, which reads as follows:

"The President may cause to be sold any military stores which upon proper inspection or survey appear to be damaged or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

The Secretary of War, by sections 678, 679, and 680 of the United States Army Regulations, prescribed the manner in which sales of

public property shall be made, and these regulations require that an inspection or survey be made and the property condemned before being sold. It has been held that there is no authority to sell or dispose of Government-owned material until the required procedure above mentioned is had.

DECISION.

1. Claimant in its petition refers to and relies upon the decision of this Board in the claim of Henry Knight & Sons (Inc.), No. 1736, but the facts set forth in that case are essentially different from the ones here presented. In the Knight case it appears that the claimant and the Government officials were in doubt as to the meaning of the clause "all waste material of every kind and nature, except rags, bags, manure, and cinders," and that pending the construction of said clause certain waste material was, with the consent of the claimant, either segregated or sold and the money realized on the sale was held by the Government as a stakeholder, with the consent of the claimant, pending the construction of said clause, and thus the amount became liquidated, or where the material was segregated the Government also held possession of the waste material pending the determination. The only question presented in that claim was one of construction of a formal contract, and when that was determined the Government was then in position to either deliver the money or the waste material to the claimant.

2. In this case no such proceeding was taken, and so far as the record discloses the Government did not hold any money or waste material pending the construction of said clause. If the Government has withheld or sold any of the waste material here claimed, it is not alleged to have done so with the consent of this claimant. The amount here claimed is wholly undetermined. If the Government failed and refused to deliver to claimant all the waste material called for by its contracts, claimant would have a cause of action against the Government for a breach of the contracts, in which action claimant could recover all the damages it sustained. Of such claims we have no jurisdiction.

3. The record in this case shows that the contracts out of which the claim arose were formal contracts, executed in accordance with the law, which have been fully performed by the parties and have expired by their own limitation. The Secretary of War is, therefore, without jurisdiction to settle or adjust such contracts or make supplemental agreements, and the claimant's remedy, if any, is by resort to the court having jurisdiction of such claims.

DISPOSITION.

Final order denying relief will be entered.

Col. Delafield and Mr. Cavanaugh concurring.

JUNE 16, 1920.

Case No. 2541.

*In re* CLAIM OF SOUTH TEXAS LUMBER CO.

1. **SETTLEMENT AGREEMENT—SUBJECT TO APPROVAL.**—A tentative settlement agreement, which is subject to approval by higher authority, is not binding on the Government until so approved.
2. **SUSPENSION OF CONTRACT—METHOD OF ADJUSTMENT.**—Where a contractor, whose contract has been suspended, is advised by the Government that it does not desire the articles which the contractor is to furnish, the contractor is justified in selling such articles in order to reduce its damages, and the Government is entitled to be credited with the net proceeds of such sales, and it is immaterial whether or not the contractor has received the purchase price, as the risk of collecting same must be borne by the contractor.
3. **SAME.**—Under the circumstances stated in the above syllabi, in order to adjust the claim, claimant should be credited at the contract price with all piling which it can show was manufactured and delivered at shipping points. Claimant should be charged with the sale price of any piling sold and the fair value of such piling remaining unsold, and claimant is entitled to be credited with any expense to which it has been put on account of piling in an unfinished state or finished piling not delivered at shipping points, in accordance with Supply Circular No. 111.
4. **CLAIM AND DECISION.**—Claim for \$3,000. Appeal from decision of Claims Board, Construction Division, allowing claimant \$1,429.03. Held, claimant entitled to an adjustment as stated in the above syllabi.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Construction Division, allowing the claimant \$1,429.03. A hearing of this case was had before this Board on April 28, 1920.

2. On October 16, 1918, claimant received order No. 12262 for five hundred 55-foot piles at a price of 11½ cents per linear foot f. o. b. shipping point. On October 29, 1918, this order was amended by adding 500 piles, which raised the total amount of piling called for to 1,000 piles. The authority for this order rested upon an order dated August 8, 1918, and known as requisition No. 9, from the officer in charge of the Construction Division to the South Pine Emergency Bureau. The latter was an organization of lumbermen created by the War Industries Board for the purpose of placing orders for materials needed by the Government.

3. On November 18, 1918, the claimant received a telegram from the Government which ordered the stoppage of all production on the above-mentioned order. Thereupon the claimant immediately ordered all of its cutters to stop production and also requested each of such cutters to send in affidavits showing the amount of piling each had produced. The affidavits so requested were turned in by claimant's employees. The gross amount thus stated was 843 pieces of piling. The affidavits were forwarded to the Government at New Orleans, together with the request that the Government make some disposition of the above-mentioned piling.

4. On January 10, 1919, the claimant's representatives went to New Orleans and discussed the matter of settlement with Maj. A. P. Hoover and Capt. H. B. Thompson, both of the Construction Division of the Quartermaster Corps. The claimant was informed that the Government did not desire the piling left on hand, as it already had more piling than it required. Thereafter, on or about January 29, 1919, a proposal was made to the claimant by Maj. Hoover to pay the claimant \$3,000, the claimant to retain property in the said piling, this settlement to be subject to the approval by the Quartermaster Corps at Washington. In the meantime the claimant, with the knowledge and approval of Maj. Hoover, sold to the United States engineers at Galveston, Tex., 485 or 492 (it was not clear which) 30-foot piles, which it had cut from the 55-foot piles on hand, and sold elsewhere eighty 25-foot tops cut from the piles. It did not clearly appear at the hearing what amount the claimant received net by reason of these sales. The claimant alleged its books showed, as the net result of the whole transaction, a loss of \$1,962.82.

5. On August 4, 1919, with a view to a settlement, Capt. F. W. Stemnler, jr., of the Quartermaster Corps, made an inspection of the piling then left on the claimant's hands. The claimant was able to show only 77 55-foot piles and 328 25-foot tops.

6. It is obvious that the number of piles which the claimant alleges it has sold, plus the piles and parts of piles which it exhibited to Capt. Stemnler, falls very far short of 843 piles which it claims to have cut.

	Whole piles.	30-foot pieces.	25-foot pieces.
Claimant sold.....	.....	492 (or 485)	80
Claimant showed Capt. Stemnler.....	77	.....	328
Total.....	77	492 (or 485)	408

The above is equivalent to (77 plus 408) 485 whole piles, plus possibly seven 30-foot pieces.

7. The claimant's method of doing business was to farm out the work to cutters in the woods in small lots. It is not unlikely that a

good deal was cut which claimant could not locate. In one instance a man named Hankin sent in an affidavit that he had cut 120 piles, but died before notifying the claimant where they were. The claimant is not able to find them.

8. The amount offered the claimant in settlement was computed by allowing it for the lumber which it exhibited to Capt. Stemmler at the contract price, less \$1, to wit, \$1,429.03.

9. The claimant asks either settlement by payment of \$3,000 under the agreement with Maj. Hoover or payment of his net loss on the whole transaction, which it alleges to be \$1,962.82.

#### DECISION.

1. The only question involved in this appeal is the correct method of settling with the claimant.

2. We find that no agreement was entered into on behalf of the Government to pay the claimant \$3,000. The tentative agreement between Maj. Hoover and the claimant was expressly made conditional on approval by higher authority, and the condition was never performed.

3. We find that the claimant, having been informed in January, 1919, that the Government did not desire the piling, was justified in selling the same in order to reduce the net loss to itself and to the Government. The Government should be credited with the net result of the sales, and it should be assumed that the claimant has received the purchase price. In other words, the risk of payment by the purchasers whom the claimant saw fit to select is on the claimant.

4. It is our opinion that the correct method for settlement is as follows:

The claimant should be credited at the contract price with all piling it can show was manufactured and delivered at shipping points, including such as was subsequently sold.

The claimant should be debited with the net results of its sales of the above piling, and it should be assumed that claimant has received the sale price, and also with the fair market value of any such piling remaining unsold at the time of settlement.

If the claimant can show by satisfactory evidence that it has been put to expense on account of piling not completed and not delivered at the shipping point, it is entitled to be repaid such expense in accordance with the provisions of Supply Circular No. 111.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, for appropriate action.

Col. Delafield, Mr. Hopkins, and Mr. Shaw concurring.

JUNE 16, 1921.

**Case No. 2791.**

*In re* **CLAIM OF VICTOR AIRCRAFT CORPORATION.**

1. **FORMER SETTLEMENT SUFFICIENT.**—When it was agreed between claimant and the Government that if claimant would move its plant from Long Island to Richmond, Ind., that it would be awarded sufficient contracts to pay its removal expenses, and claimant was awarded a contract, which was suspended and a settlement had in which an allowance was made for removal expenses, which is deemed sufficient; no further allowance will be made.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$24,091.62 removal expenses. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board.

**DECISION.**

1. This claim came before the Board of Contract Adjustment for a hearing on January 28, 1920. Its docket number was 2121. On February 18, 1920, a certificate, Form C, was issued which was accepted and approved by the claimant under date of March 1, 1920, and a document setting forth the nature, terms, and conditions of the agreement was executed in which it was stated that an implied agreement was made about the middle of July, 1918, between the Government and the claimant—

“Whereby the Government agreed to give claimant a sufficient number of contracts for the construction of airplanes to reimburse claimant over and above the expenses of such construction for its expenses in moving its organization from Freeport, Long Island, N. Y., and establishing a plant for the construction of airplanes at Richmond, Indiana, and for its expenses in moving back its organization to Freeport, Long Island.”

2. The claim was referred by this Board to the Claims Board, Air Service, for action and for further procedure as prescribed in subsection (c), section 5, Supply Circular No. 17. The Claims Board, Air Service, had the books and records of the claimant and the Government so far as they relate to the matter of this claim audited, and a report has been made by the Government accountants. A hearing was granted to the claimant by that Board on April 26, 1920, at which Mr. Albert S. Heinrich, the president and apparently the only person interested in the claimant corporation, testified. After consideration of his testimony and the report of the accountants and the Government records the Air Service Claims Board has determined that the claimant has been paid in full for everything to which the claimant corporation was entitled and that no additional



amount ought to be awarded the claimant. From this decision of the Air Service Claims Board the claimant has appealed to the Board of Contract Adjustment.

3. The entire record and the transcript of the testimony of Mr. Heinrich, together with the exhibits in the case, have all been examined. We are satisfied that the decision of the Air Service Claims Board that the claimant corporation has been paid in full should be affirmed and that no further payment should be made.

4. It appears that the claimant corporation had for its chief asset the services of Mr. Albert S. Heinrich, its president, who was an experienced aeronautical engineer and pilot. The services which he rendered were those of an expert. The Bureau of Aircraft Production desired the claimant to move its location from Freeport, Long Island, to Richmond, Ind., where it would be closer to McCook Field and to the place where experiments in the construction and use of airplanes were being carried on. Assurances were given the claimant by the Government that if it moved from New York to Indiana it would receive contracts sufficient to reimburse it for its expenses in moving out and back.

5. October 22, 1918, a formal contract was entered into between the Government and the claimant, numbered 130, calling for the construction by the claimant of four airplanes at a cost of \$18,000 each, a total of \$72,000. It was contemplated at the time this contract was entered into that the contract price would cover the expenses to which the claimant would be put in moving from Freeport to Richmond and back again. Contract No. 130 was suspended immediately after the armistice. The claimant had transported from Freeport to Richmond eight men and not over a carload of supplies. No machinery was moved. Negotiations were entered into for the adjustment of contract No. 130, and on February 21, 1919, a supplemental contract was entered into, numbered 130-A, terminating contract No. 130, by the terms of which the contractor was to receive the sum of \$14,056.82. This amount has since been paid. The items on which the payment of the \$14,056.82 was awarded the claimant are found in the record. We are convinced that the payment of that sum has fully reimbursed the claimant for all its costs and expenses, both in moving eight men from Freeport, Long Island, to Richmond, Ind., and back again, and also for such expenditures and commitments as it made in the performance of contract No. 130.

The decision of the Air Service Claims Board is affirmed.

#### DISPOSITION.

A copy of this decision will be transmitted to the Air Service Claims Board for its information, and to the claimant corporation.

Col. Delafield concurring.



JUNE 17, 1920.

**Case No. 2794.**

*In re* **CLAIM OF WILLIAM H. PATTERSON.**

- 1. ORAL AGREEMENT TO COMPENSATE GOVERNMENT EMPLOYEE FOR USING HIS AUTOMOBILE.**—Where an employee of the Ordnance Department uses his own machine in the necessary service of the Government, in the performance of his duties, and on the authority of the chief production officer of the Philadelphia district, who promised that the Government would pay therefor, an agreement arose under the act of March 2, 1919, to remunerate claimant therefor.
- 2. AUTOMOBILE HIRE, CONTINUING AGREEMENT FOR.**—Where claimant owned an automobile and used it in his work as traveling production representative of the Government under an oral agreement that he would be compensated for its use and for expenses of its operation, entered into prior to November 12, 1918, such an agreement is a continuing one so long as the officer continues to perform the same duties in the same branch of the service and uses the automobile for the agreed purposes, and he is entitled to reasonable compensation therefor under the act of March 2, 1919, although a portion of the time for which claim is made is subsequent to November 12, 1918, but he is not entitled to compensation under said act for the use of the automobile after his transfer to another branch of the service.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$348 hire of automobile. Held, claimant entitled to recover.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$348, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant entered the service of the United States on September 6, 1918, as an employee of the Ordnance Department. His title was that of traveling production representative and his duties required him to visit 60 manufacturing plants in the neighborhood of Philadelphia. The use of an automobile was indispensable for the performance of his duties. There was no Government car available, and Mr. William Vollmer, who was chief of production in the

Philadelphia district, authorized the claimant to use his own car in Government service and told him that he would be paid for its use on a per diem rating. Mr. Vollmer's affidavit is as follows:

"That during my connection with the Philadelphia ordnance district, in capacity of chief of production, I authorized certain of my inspectors to use their own automobiles in the Government service, with the understanding that they would be compensated for such use at a per diem rate.

"I had what I considered sufficient approval for making this statement and subsequently for issuing an order to that effect. Mr. Patterson was one of my inspectors who supplied his own automobile, and to my personal knowledge used his own car in the Government service at least 116 days."

2. Before authorizing the claimant to use his own car Mr. Vollmer took up the matter with Maj. R. A. Greene, manager of the Production Division, and obtained his sanction. Unsuccessful attempts have been made by the Finance Division to pay the claimant for the use of his automobile. On October 4, 1918, Mr. Vollmer sent a letter to the claimant and others reading in part as follows:

"If you now own and use in the service of the Government an automobile, it is right and proper that all expenses in the operation of the car should be paid by Government voucher."

3. The claim is for the use of the car from September 9, 1918, to May 4, 1919, a total of 116 days, at the rate of \$3 per day, a total of \$348. It is alleged that the claimant traveled over 5,000 miles in the Government service. The charge does not include anything for depreciation or garage charges or insurance or unusual repairs, but does include the cost of gasoline, oil, tires, cleaning, and ordinary repairs.

4. Mr. Patterson was transferred on February 9, 1919, to the subcontract branch, and after that date no longer reported to Mr. Vollmer. There is no evidence in the record showing any additional authority or request to the claimant for the use of his automobile after February 7, 1919.

#### DECISION.

1. The facts are not in dispute. They show a promise on the part of the claimant's superior that he should be paid for the use of his automobile while it was being used in the Government service. It also appears that no Government car was available and that the claimant could not have performed the services which he was required to perform without the use of an automobile. If the claimant had not been an employee of the Government there would have been no question that under the circumstances he would be entitled to reasonable compensation for the use of his car. We believe that the fact that he was an employee of the United States does not pre-

clude him from recovery for the use of his car. The promise to pay for its use and the necessity for it are clearly established.

2. The question of whether the claimant is entitled to any compensation after the granting of the armistice of November 11, 1918, is not free from difficulty. The claim is for relief under the provisions of the act of March 2, 1919, and no relief can be given under that act for contracts entered into after November 11, 1918. If the agreement between the United States and the claimant was a separable one—that is, one entered into daily whenever the use of his car was necessary—he would be entitled to compensation only for its use prior to the armistice. We believe, however, that the agreement was not a separable one, but that the promise made to the claimant by Mr. Vollmer on September 9, 1918, was that the Government would pay the claimant for the use of his automobile during the entire period that its use was indispensable and that the compensation to be paid the claimant was to be reasonable compensation based on a per diem rate. The agreement between Mr. Vollmer and the claimant can not reach beyond the day when the claimant was transferred to another branch and was no longer under the supervision of Mr. Vollmer. He is entitled to fair and reasonable compensation, therefore, for the use of his automobile from September 9, 1918, up to February 7, 1919. If he continued to use his automobile in Government service under such circumstances as to make the Government liable to him for its use, no relief can be given him under the act of March 2, 1919, and his claim must be based on the ordinary rules of law applicable to such transactions. It may be that this claimant is entitled to compensation for the use of his car between February 7, 1919, and May 4, 1919, on an implied contract, and his right to recovery would be a legal one in the nature of a *quantum meruit*. That portion of his claim, however, is not before us, and we make no finding in relation to it.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Ordnance Claims Board for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield concurring.

JUNE 17, 1920.

Case No. 2760.

*In re* CLAIM OF IVES, HANLON & LEWIS.

1. **CONSTRUCTION CONTRACT, SUSPENSION OF—METHOD OF ADJUSTMENT.**—Where claimant has a formal contract for construction work which is suspended by the Government after partial performance, without fault on claimant's part, claimant is entitled to recover for the services performed, although the contract provides that 20 per cent of the amount due claimant on "each account" shall be retained until final completion of the work, and although claimant declines to complete certain parts of the work at contract price when directed so to do several months after suspension thereof.
2. **CLAIM AND DECISION.**—Claim for \$1,018.17 under General Order 103 for services and materials under a contract for the installation of certain heating, plumbing, and refrigeration at Camp Knox, Ky. Held, claimant entitled to recover.

Maj. Henry writing the opinion of the Board.

This claim arises under General Order 103. It is presented in the form of an attested petition, and was filed with this Board originally.

The claim is for \$1,018.17 for services alleged to have been rendered and materials alleged to have been furnished under a formally executed contract dated June 26, 1919, entered into between claimant and Robert Bonner, major, Quartermaster Corps, United States Army, for heating, plumbing, and refrigeration at Camp Knox, Ky.

STATEMENT OF FACTS.

The following facts appear from the record:

1. On June 26, 1919, claimant, a partnership trading and doing business under the name of Ives, Hanlon & Lewis, at Louisville, Ky., entered into a formally executed contract with Robert Bonner, major, Quartermaster Corps, United States Army, under which the contractor agreed to furnish certain materials and services for construction work in connection with heating, plumbing, and refrigeration systems at Camp Knox, Ky., at the agreed price of \$51,043.60. Under the terms of the contract, the contractor agreed to begin work on June 30, 1919, and to complete the work on or before September 9, 1919. The contract contains no cancellation or suspension provisions.

2. Article VI of the contract provides as follows:

*" \* \* \* Upon the first 50 per cent of completed work, 20 per cent of the amount of each account shall be retained until the final completion and acceptance by the Government of all the work under this contract: Provided, That on completion and acceptance of each separate building, vessel, or distinct public work hereunder for which the cost is stated separately, payment therefor may be made in full, including the retained percentages thereon, if so completed within the time stipulated."*

3. On or about June 30, 1919, claimant began work under the contract, and on or about July 11, 1919, claimant was officially ordered by Maj. Bonner to cease work. This action was taken by Maj. Bonner because of a joint resolution of Congress, approved July 11, 1919, which was understood by Camp Knox officers to require the suspension of further expenditures for construction work at the camp.

4. Apparently some doubt arose in Congress concerning the proper interpretation to be placed upon the above resolution, and it was followed by another resolution, approved August 12, 1919, which specifically provided for the payment of bills for work of this kind performed prior to the passage of the joint resolution of July 11. It also appears that on February 28, 1920, certain sums were allotted by Congress for the completion of miscellaneous construction work at Camp Knox, Ky., and on March 22, 1920, claimant was directed by Maj. Bonner to proceed with the work as regarded the completion of certain items. This the claimant declined to do at the original contract price, and it has never since done or agreed to do this work.

5. When ordered to stop work under the contract claimant was ready and willing to continue the work, and the cessation of work in no way appears attributable to claimant's fault.

6. When claimant stopped work, as instructed, it had furnished materials and performed services according to the compensation provisions of the contract in the amount of \$5,090.85. In accordance with that portion of Article VI quoted above, claimant has been paid 80 per cent of this amount, and it brings this claim for the remaining 20 per cent, amounting to \$1,018.17. No part of this claim is based upon damages resulting from the action of the Government in preventing claimant from fully performing the contract.

7. The material facts in the case are not disputed, but payment of this 20 per cent has been withheld on the ground that the contract terms prevent its payment until all of the contract work has been done, regardless of whether the work has been interrupted or as a result of whose action.

## DECISION.

1. It sufficiently appears that claimant in this case had a valid contract, which it was engaged in carrying out in accordance with its terms when directed to cease operations. The orders to this effect received were of such a character and given under such circumstances as show an intention on the part of the Government and the particular officers in charge of work at Camp Knox to effect a suspension of operations under the contract pending a determination of the attitude of the Government toward further construction work at Camp Knox and methods of payment therefor. This is borne out both by the language of the resolutions of Congress and by the acts of the construction officers, taken by way of interpretation thereof, both in directing the suspension of the work and in later directing its resumption when the uncertainties surrounding the situation had apparently been cleared up by subsequent congressional action.

2. In view of the foregoing, claimant's contract was never canceled or terminated, and claimant is entitled to an adjustment thereof by the Secretary of War, of which claimant is not to be deprived either by a clause in the contract which can not be applied to a situation arising through no fault of the claimant, or by the fact that the time for performance stated in the contract has elapsed through the fault of the Government itself and not as a result of anything attributable to claimant. This conclusion is not affected by the fact that claimant declined to resume the work upon the original contract terms. At the time the request to do this was made by Maj. Bonner it would have been impossible to place claimant in its former position with respect to the work so as to make compliance with the request a reasonable act to expect of claimant, or one that claimant should be held to have been legally bound to do.

3. Claimant should, therefore, be paid the value of its services in accordance with the contract terms in respect of the 20 per cent of work performed by it under the contract and not yet paid for.

## DISPOSITION.

1. The claim will be forwarded to the Claims Board, Construction Division, for ascertainment of the amount of said 20 per cent of work so performed, and the value of claimant's services in the performance thereof in accordance with the contract terms and appropriate disposition in accordance with this opinion.

Col. Delafield and Mr. Howe concurring.

JUNE 18, 1920.

Case No. 2490.

*In re* CLAIM OF THE WESTERN INDUSTRIES CO.

1. **DEFAULT IN DELIVERY—SUSPENSION OF CONTRACT—REIMBURSEMENT.**—Where claimant was so in default of deliveries on its contract to manufacture and deliver 200,000 gallons of ethyl alcohol to the Government that it could not have compelled the Government to take any part of such amount, and where there was no waiver by the Government, claimant is not entitled to reimbursement of loss sustained in its effort to perform such contract, which was suspended before any deliveries were made.
2. **GOODS NOT MANUFACTURED FOR CONTRACT.**—And where, in addition to the above circumstances, it does not appear that the article on which loss is claimed was manufactured especially for the Government order in question, there can be no recovery for such loss before this Board.
3. **CLAIM AND DECISION.**—This claim for \$30,247 is an appeal from the Contract Review Board and is presented upon the theory that claimant sustained a loss by the suspension of a formal contract. Held, claimant is not entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Contract Review Board denying a claim upon a formal contract between the claimant and the Government, numbered 1309, dated September 13, 1918, for 200,000 gallons of ethyl alcohol 190° proof, at 49.5 cents per gallon f. o. b. Agnew, Calif.

2. Under the terms of the contract, delivery was to begin on the date of approval of the contract (Oct. 14, 1918), one-half of the total amount to be delivered within 30 days and complete delivery to be made within 60 days. Under the heading of "Shipping instructions" the contract provided as follows:

"The contractor shall notify the 'Transportation Branch' of the Medical Department, Unit 'F,' Seventh and B Streets NW., Washington, D. C., when material is ready for shipment, and the said 'Transportation Branch' will send the necessary shipping instructions to the contractor with as little delay as possible."

3. Some time in the month of October the claimant alleges it set aside a certain number of barrels of ethyl alcohol for shipment under



its contract. It happened, however, that about the same time similar alcohol which was being delivered under another contract was rejected by the Government because it was found to have absorbed aldehyde from the containers. Except on account of the presence of aldehyde, there seems to have been no criticism of the claimant's product. The absorption was occasioned by the alcohol having been in the barrels for several months. The claimant, accordingly, decided not to apply this alcohol on its contract No. 1309, fearing it might show similar absorption.

4. On October 29, 1918, Capt. Charles E. Schaeffer, of the Sanitary Corps, wrote to the claimant as follows:

"I am in receipt of shipping instructions A-5053, covering 200,000 gallons of ethyl alcohol applying on contract No. 1309, dated September 19, to be forwarded to the field medical supply depot, 21 M Street, this city, and shipping order A-5054 for 15,000 gallons of ethyl alcohol applying on contract No. 603, dated June 18, 1918, for shipment to the same point.

"It is requested that these shipments be expedited. If any difficulty is being encountered by the nonreceipt of the Treasury permit, it is requested that you promptly notify me in order that these permits may be furnished at once."

5. This letter was received November 5, 1918, by the claimant. On the same date claimant replied to Capt. Schaeffer as follows:

"This acknowledges yours of October 29, reference Surgeon General's Office, Production Department, and addressed to our San Francisco office.

"We have found by experience in handling your contract No. 603, and also contract 1309, that a very long time elapsed between time contract was placed and deliveries made.

"As soon as we were awarded contracts 603 and 1309 we put up large quantities of alcohol in barrels, so as to be ready to expedite shipment in every possible way as soon as we received your shipping instructions. We intend to discontinue this practice, however, as the indefinitely long storage in barrels tended to affect the quality of the alcohol. This was instanced in two of the shipments of 603 being rejected.

"To avoid the possibility of such rejections and insure your getting the highest grade of alcohol, we intend to manufacture goods destined for you as short a time before shipment as possible.

"We are now starting to manufacture against your shipping orders A-5053 and A-5054, and expect to have the whole quantity deliverable thereunder delivered within two months.

"This is the best delivery we can make during the present influenza epidemic, which has cut down our personnel and obliged us to curtail our production.

"We will ask you, however, to arrange so that, as soon as a certain quantity, say, 150 to 200 barrels, is produced and the details are given to the Internal Revenue Department, Treasury permit releasing the goods for shipment to you be sent us promptly. This will permit us

to be continually turning over new stock to you in a continuous chain and do away with the possibility of any of the goods being kept too long in storage and thereby having their quality affected."

6. On November 22, 1918, Maj. Frank L. McCartney, of the Sanitary Corps, wrote the claimant from Washington the following letter:

"SIRS: There are certain drug items contracted for by the Medical Department on the former supply program which will not be required in as large a quantity, due to the cessation of hostilities.

"It is desirable to curtail delivery in so far as possible without material inconvenience to yourself. You will inform this office if the entire quantity can be canceled or furnish a statement indicating the amount made up or in the course of manufacture which can not be consumed in your commercial business.

"We have outlined below the items covered by contract with you, for which we desire to effect complete or partial cancellation, and request the above information be furnished as promptly as possible.

"By authority of the Director of Purchase:

"(Signed) FRANK L. MCCARTNEY,  
Major, Sanitary Corps, U. S. Army.

"Uncompleted portion of contract No. 1863, October 23, 1918.

"200,000 gallons alcohol, ethyl, U. S. P., 190° proof.

"Med. A. X. 13."

The above letter presumably, in the course of mail, did not reach the claimant for several days.

7. On November 23, 1918, the claimant wrote Capt. Schaeffer that it had ready for delivery under its contract, No. 1309, 193 barrels which we understand to be approximately 10,000 gallons. On the same day claimant sent to the chemist, Surgeon General's Office, two quart samples of the alcohol.

8. On November 26, 1918, claimant notified Capt. Schaeffer that it had 192 barrels of alcohol ready for shipment. On the same day claimant sent to the chemist, Surgeon General's Office, three quart samples of alcohol, being a part of the alcohol which it was preparing to ship under contract No. 1309.

9. On November 29, 1918, claimant notified Capt. Schaeffer that it had 192 barrels of alcohol ready for delivery. On the same day claimant sent to the chemist, Surgeon General's Office, samples of alcohol ready for shipment under contract No. 1309.

10. On November 23, 1918, Maj. McCartney wrote the claimant the following letter:

"WESTERN INDUSTRIES Co.,  
Agnew, Calif.

"SIRS: In reply to yours of November 12, you are advised that this department is not now urgently in need of additional quantities of alcohol, and we are willing to allow the matter of releases

through the Internal Revenue Department to take their course. This refers to shipment rejected at San Francisco depot.

"By authority of the Director of Purchase:

"(Signed) FRANK L. McCARTNEY,  
"Major, Sanitary Corps, U. S. Army."

11. On December 5, 1918, claimant wrote to the War Department, Director of Purchase and Storage, Medical and Hospital Supplies Division, as follows:

"We have yours 22d regarding curtailment of deliveries under contract 1863, October 23, 1918.

"We are open to a cancellation of the above contract, as well as the undelivered portions under contract 603, dated June 28, 1918, and entire quantity under contract 1309, dated September 13, 1918.

"Our reason for this is due to the fact that the medical department has seen fit to reject portions of deliveries made under contract 603, after we had taken every pains to give goods of exceptional quality. In fact, we have been manufacturing for you goods of much higher quality than the type we had to deliver as records of tests made in our laboratory show, all goods destined for your department being submitted, when manufactured, to a test quite more severe than the required test.

"For years, we have been satisfactorily supplying several firms very exacting as to quality, such as E. R. Squibb & Sons. We have further ascertained that our alcohol is purer than any other manufactured in the United States.

"One thing we dislike above all is controversy, and for this reason we are open, as stated above, to a proposal of cancellation on your part."

12. On the same day, that is, December 5, 1918, claimant wrote to Lieut. Conrad E. Langfield as follows:

"We have yours November 27, file 1535/21, relative preliminary samples of alcohol submitted to us, as per our communication November 12, covering replacement delivery under contract 603.

"We have just written to your department under separate head, attention Maj. Frank L. McCartney, as per copy of letter inclosed, explaining how we prefer, rather than have any more controversy with your department regarding the quality of our goods, to cancel all contracts. The copy of the letter is self-explanatory.

"For your information, every lot of alcohol is examined to see that it reaches your specifications before it leaves our plant—and it more than reached them; wherefore the reason we can not understand how such rejections can be made.

"Our proposed cancellation of contracts as above covers everything undelivered under contract 603, dated June 28, 1918; entire contract 1309, dated September 13, 1918; and entire contract 1863, dated October 23, 1918. Against all of above we now hold shipping orders."

13. On December 11, 1918, Lieut. Langfield wrote the claimant a letter, which, so far as material, follows:

"We have your communication of December 5, and note that you are willing to cancel contracts placed with you for the supply of alcohol ethyl, 190° proof.

\* \* \* \* \*

"Supplementary contracts will be forwarded to you cancelling contracts No. 1309 and No. 1863, and it is requested that you return to our transportation department the shipping instructions you hold against these two contracts.

"The deliveries you have made have been very satisfactory, and with reference to the rejected shipments, this does not mean that your alcohol has not been of the highest quality but evidently entirely due to the containers. We know that these rejections will be satisfactorily replaced and contract No. 603 completed."

14. On December 6, 1918, Lieut. Col. John P. Fletcher, of the Medical Corps, wrote the claimant in part as follows:

"From: The officer in charge, Medical and Hospital Procurement Division, Office of the Director of Purchase.

"To: Western Industries Co.

"Subject: Cancellation of contracts.

"1. You are hereby advised that the termination of your contracts S. G. O. No. C-1309, dated September 13, 1918, and S. G. O. No. C-1863, dated October 23, 1918, for alcohol, ethyl, 190° proof, and internal-revenue tax unpaid, in barrels, has been approved by the Director of Purchase and, where required, cleared by the War Industries Board. You are, therefore, requested to immediately suspend work on this material and forward at once the sworn statement in duplicate furnished to you with our letter of November 21, 1918.

"2. Upon receipt of the statement mentioned above a supplementary contract for your signature will be prepared 'which shall set forth the agreed compensation and shall provide in specific terms that it constitutes a full and final settlement of all questions and claims growing out of the original contract or order.' (S. C. 111, par. 6.) If you deem it desirable the terms of this supplementary contract can be discussed with you personally.

\* \* \* \* \*

"4. Please note that this is a request to suspend work on the contracts mentioned and not a mandatory notice of cancellation. Cancellation, reduction, or suspension of your contract is, however, desired, and it is hoped that you can see your way clear to comply with this request so that an equitable supplementary contract may be negotiated at once.

"5. The statement requested by our letter of November 21, copy of which is inclosed, must be in this office not later than ———.

"By authority of the Director of Purchase and Storage.

"JOHN P. FLETCHER,

"Lieutenant Colonel, Medical Corps, U. S. Army,

"In Charge of Medical and Hospital Division."

15. The claimant alleged that it did not receive the letter of December 6, 1918, but states that it received a copy of this letter inclosed

in a letter dated December 16, 1918, from Lieut. Langfield, which was in part as follows:

"With reference to your telegram, we are attaching hereto copy of letter mailed you on the 6th inst., but you can disregard instructions contained in this letter, since you have agreed to cancel contracts Nos. 1309 and 1863.

\* \* \* \* \*

"Although contract No. 1309 has been canceled, you will be interested to know our chemist had issued a report favorably passing upon the samples you submitted under Nos. 3336848-928, 336929-7028, and 337029-39.

"By authority of the Director of Purchase."

16. On December 20, 1918, claimant wrote Lieut. Langfield as follows:

"We have yours 11th, file 1535/21.

"We do not understand your letter very well. We expected especially as we voluntarily suggested that we were open to cancellation of contract, that the Government would make an equitable adjustment to cover the profits that we would lose by such cancellation.

"We could have sold the alcohol that we reserved for your department elsewhere at time we sold it to the Government. Now, with it thrown back on our hands, it is doubly difficult to dispose of, as the alcohol market has been demoralized, due, presumably, to the large quantities of alcohol thrown back on the market by the Government.

"Perhaps the supplementary contract you speak of will take care of this point in adjusting profits. If they have not been sent yet, we will be pleased to hear from you along above lines promptly."

17. On December 16, 1918, Maj. McCartney sent a cancellation agreement covering contract No. 1309 to the claimant. Thereafter correspondence ensued, in which the Government requested the claimant to sign the cancellation agreement and the claimant refused to do so without compensation, alleging that on receipt of shipping order No. A-5053 the claimant has manufactured 30,000 gallons of alcohol.

18. It appears from the testimony of Mr. Karol S. Maryanski, assistant secretary of the claimant, called by it as a witness, that during the months of September and October, 1918, the claimant was engaged to its full capacity in manufacturing alcohol for private concerns. There is no direct evidence as to what the claimant was doing the first 11 days of November, 1918, but presumably it continued its operations for private customers as theretofore, with the possible exception that it may have been manufacturing some alcohol for contract No. 603, with which this case is not concerned. Deliveries, however, under the latter contract, which was for 40,000 gallons, were not completed until several months later.

19. It further appears from Mr. Maryanski's testimony that upon the armistice being declared the company "surmised that the Gov-

ernment would not require such large quantities of alcohol, but until we heard directly from the Government, we had no way of knowing how the Government would act concerning alcohol contracts."

20. It further appeared from Mr. Maryanski's testimony that the claimant did not start to manufacture the alcohol called for under contract No. 1309 in Capt. Schaeffer's letter of October 29, 1918, until a day or two after the armistice.

21. The capacity of the claimant's plant was about 10,000 gallons a day and the length of time necessary for the process of manufacture of molasses into alcohol was from a week to 10 days.

22. The claimant has formally, by statement, filed with the record, waived all claims in connection with contract No. 1309, except for actual loss sustained in connection with the 30,000 gallons above referred to.

#### DECISION.

1. The claimant in this case had notice at least as early as September 13, 1918, when its contract was dated, that it would be expected to commence deliveries of ethyl alcohol on the "day of approval" of the contract, and that 100,000 gallons should be delivered within 30 days of approval. It might reasonably have been expected of the claimant that it would put itself in a position to begin deliveries on the day approval of the contract was granted, to wit, October 14, 1918. During the months of September, October, and down to at least the 12th day of November the claimant apparently did nothing to carry out the clear terms of its contract, except, as it alleges, to allocate to the contract certain alcohol which, as it subsequently developed, would not pass the Government tests on account of having been in the containers too long. During this entire period, the claimant was engaged in the execution of private contracts, with the possible exception of the manufacture upon another small contract of somewhere between 25,000 and 40,000 gallons of alcohol for the Government. The contract provided that the claimant should notify the transportation branch of the Medical Department when the alcohol was ready for shipment. If the alcohol was allocated to this contract in October, as alleged, claimant never took any action to notify the proper authorities of this fact.

2. On November 5, 1918, the claimant received a letter in which it was requested that "shipments be expedited" of alcohol under its contract in this case. The claimant at the time, according to the testimony of its witness, had a constant stream of finished product passing through its warehouse, amounting to 10,000 gallons per day. The claimant did not appropriate any part of this alcohol to Government needs, as expressed in the contract in the present case, until the 22d day of November, 1918.



3. If the claimant had started manufacture, turning its capacities to the performance of this contract on November 5, as it states in its letter of that date, it could have produced at least 50,000 gallons of alcohol for the Government by November 22. If it had turned its entire daily output to Government needs, including alcohol which it had already started in process prior to November 5, it could have turned over some 50,000 gallons to the Government before the armistice and twice that amount before November 22. Instead of taking either course, it was not until the 22d day of November that the claimant wrote the Government that it had 10,000 gallons of alcohol ready for delivery. On the 26th day of November it wrote that it had 10,000 gallons more and on the 29th day of November that it had 10,000 gallons more.

4. Meanwhile the armistice had been declared, and, according to the testimony of the claimant's witness, there was an immediate drop in the price of alcohol, which went lower and lower as time went on. The matter of allocating a particular lot of alcohol to a particular contract, whether private or otherwise, must have been a matter subject to instantaneous decision. No alcohol was tagged or marked in any way until it was in the finished state and actually placed in containers. There is, therefore, no clear and positive evidence that any alcohol was allocated to the contract in the present case until November 22, 1918. The process, however, of turning molasses into alcohol necessitated from a week to 10 days. Giving the claimant, therefore, the benefit of every doubt, it could not have been more than 10 days prior to November 22—that is, a day after the armistice—that it actually commenced work on the contract. On November 14, 1918, the claimant was in default approximately 100,000 gallons on its contract.

5. The claimant has argued that the Government has waived any delinquency in delivery on its part under the contract by a failure to respond or to take some action upon receipt of claimant's letter of November 5, 1918, announcing the course which it intended to pursue in connection with deliveries. We do not find in the case a waiver by any Government official. But even if there were evidence of such waiver, there was further delinquency, in that the claimant did not immediately on November 5 start deliveries, or at least start to manufacture under its contract.

6. At the declaration of the armistice the claimant's officials surmised that the Government would not require such large quantities of alcohol. Under date of November 22, by letter which presumably reached the claimant some days later, the Government indicated its desire to cancel the existing contracts. Under date of December 5 the claimant wrote that it was open to cancellation. This letter has



been subject to some discussion and has been differently interpreted by the claimant and the Government agents. We do not find from this letter that the claimant released any rights which it then had or intended to cancel without recompense. Under our decision in this case, however, the matter of interpretation of the letter is immaterial, but it is sufficient to indicate that the claimant was advised at least as early as December 5, 1918, that the Government desired cancellation of the contract in the present case.

7. We find that under the circumstances outlined above the Government had the right to decline to take shipments of alcohol under the contract, and is not bound to reimburse the claimant for loss sustained in connection with the manufacture of the 30,000 gallons in question.

#### DISPOSITION.

The claimant's appeal is hereby dismissed, and a copy of this opinion will be sent to the Claims Board, office of the Director of Purchase.

Col. Delafield and Mr. Hopkins concurring.

. JUNE 18, 1920.

**Case No. 1491.**

*In re* **CLAIM OF PHILIP CAREY CO.**

1. **MEASURE OF LOSS.**—In adjustment of claims under a suspended contract, the measure of loss on raw materials, which were afterwards used in commercial business, is not the difference between what claimant paid for them and what claimant subsequently paid for similar materials when it went into the market for them several months after such suspension, but is the difference between what claimant paid for the materials and the market value at the time the same materials were used by claimant.
2. **SUBCONTRACT—GOVERNMENT REQUISITION.**—Where a subcontractor received a Government requisition containing a provision that confirmation and payment would be made by the prime contractor, the Government obligated itself to protect the subcontractor against loss suffered by it on account of failure of the prime contractor to confirm the order.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$7,183.34, based upon an informally executed contract for fiber wall board. Held, claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This is an appeal from a decision of the Board of Contract Review, Construction Division, United States Army, on a claim for \$7,183.34, on a requisition order, under the following circumstances:

2. In September, 1918, claimant company was advised by R. S. Teele, purchasing agent for the Government, that the Government would need 10,000,000 square feet of fiber wall board, and that the claimant company would receive an order for approximately one-half of this amount. Claimant company was given three requisition orders, Nos. 101, Fort Benjamin Harrison, dated November 2, 1918; 107-B and 121-B, Camp Knox, dated November 6, 1918, for the manufacture of approximately 3,600,000 feet of fiber wall board, to be used for construction purposes at Camps Harrison and Knox. These requisition orders were signed "R. C. Marshall, jr., brigadier general, by C. M. Foster, captain, Quartermaster Corps." This claim is only for the materials purchased and necessary for the performance of requisition order No. 101, dated November 2, 1918.

3. This order reads in part as follows:

"Board to meet all specifications adopted by War Industries Board and War Service Committee on Wall Board."

4. Claimant company commenced to manufacture fiber wall board, and on November 8, 1918, had completed one carload. This was inspected by a Government inspector and rejected, and on November 11, 1918, the following telegram was sent to claimant company:

"Cancel orders 121-B, Camp Knox, 1,464,000 square feet Government specification wall board, and order 107-B, Camp Knox, 936,000 square feet, and 101, Fort Benjamin Harrison, 1,200,000 square feet. This action taken because of your inability to manufacture Government specification wall board as reported by inspection department."

5. On receipt of this telegram, claimant company called Mr. Teele on the telephone and objected to the inspection for the reason that this fiber wall board was identical with the wall board which had previously been supplied to 38 different camps without a single complaint. Mr. Teele disposed of the matter by stating that the orders would have been canceled anyway because of the signing of the armistice. The testimony shows that the wall board did not comply with the charts used by the inspector in making his examination but that the wall board might have been altered so as to meet the test required. No claim is made in respect to the rejected wall board. It has since been sold by the claimant.

6. Claimant company purchased chip board in the latter part of October for the performance of contracts with the Government. After the orders were suspended it used this chip board in its commercial business. It appears that approximately 718,334 pounds were necessary to manufacture the 1,200,000 square feet of wall board called for in requisition order No. 101. No claim is made for any chip board purchased for requisition orders Nos. 107-B and 121-B, but only for the amount necessary to complete requisition order No. 101. After the signing of the armistice the price of chip board diminished and on February 28, 1919, the time that the claimant again went into the market for chip board, it was able to purchase this chip board at \$40 per ton, and now asks to be reimbursed in the sum of \$7,183.34, which is at the rate of \$20 per ton, the difference between the price paid for the chip board and the price that chip board could have been purchased on February 28, 1919.

#### DECISION.

1. There is no question but that the claimant company did receive requisition order No. 101 for the manufacture of 1,200,000 feet of fiber wall board and that it did purchase 718,334 pounds of chip board, at \$60 per ton, for the performance of this order.

The Government placed the order for immediate production of the material enumerated. Its requisition order contains a provision that "Confirmation and payment of this order will be made by Bedford Stone & Construction Co." The Government, in placing this requisition order containing the above provision, obligated itself to see that Bedford Stone & Construction Co., another Government contractor, confirmed the order and paid for the materials. Order No. 101 was a Government order. The material ordered was to be used by another Government contractor in performance of Government contracts, but the agreement which is evidenced by order No. 101 is an agreement in which claimant company is one party and the United States is the other. There is no evidence that the Bedford Stone & Construction Co. has confirmed the order and paid the obligations incurred by claimant company. The undertaking of the United States goes at least as far as to protect claimant company against such loss as it has suffered by failure of the Bedford Stone & Construction Co. in fulfilling the provision above referred to.

2. The difficulty is to determine the amount of loss suffered by claimant company. The evidence shows that the market price of chip board diminished after the signing of the armistice, and that when the claimant company again went into the market, February 28, 1919, the price of chip board had dropped to \$40 per ton. The claimant company, however, between the time the contract was suspended and February 28, 1919, had used this chip board in its commercial business, which it had a right to do. Claimant company is therefore only entitled to recover the difference between the price paid for the chip board and the market value at the time the chip board was used. This claim will be returned to the Claims Board, Construction Division, to determine the amount of loss, if any.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Construction Division, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Capt. Frazer concurring.

JUNE 18, 1920

Case No. 2625.

*In re* CLAIM OF LEHIGH VALLEY RAILROAD.

1. **RAILROAD FACILITIES.**—Where after consulting an officer of the Ordnance Department, who stated that incoming freight to a certain arsenal might amount to 250 cars a day, claimant built a siding on its own right of way at a considerable distance from the arsenal in order to take care of the traffic, there was no implied agreement within the meaning of the act of March 2, 1919, whereby the Government became obligated to pay claimant the cost of constructing the siding.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$10,053.50, based upon an implied agreement in relation to a railroad siding. Held, claimant is not entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$10,053.50, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant owns and operates a railroad in the State of New Jersey. The main line of the railroad branches at South Plainfield, N. J., and one line runs from there to the terminus at Jersey City and another line runs to the terminus at Perth Amboy, N. J. A branch line runs out of the Perth Amboy line from Raritan Junction to the terminus at the Raritan Arsenal. This is called the Raritan Branch.

3. In November, 1917, there was a conference between Maj. White, of the Ordnance Department, and the representatives of the claimant, at which Maj. White stated that it was expected that the incoming freight destined to the Raritan Arsenal might amount to 250 cars a day. There was a discussion as to how this large additional amount of freight should be handled, and as to whether the facilities of the railroad were adequate to take care of so large an increase.

4. Shortly after this conference the claimant ordered the construction of a double-end siding on its Perth Amboy line a short distance from the point where the single track to the Raritan Arsenal branches

from the main line to Perth Amboy. The siding was constructed. Its length was 1,028 feet and its cost \$10,053.50. The claimant's witnesses testified that this siding was built solely for the purpose of handling the additional freight which was destined for the Raritan Arsenal, that it served no other purposes, and that its use was chiefly to enable the claimant to comply with the directions of Government officers that the cars should be held at a point somewhat removed from their destination and taken from that point and delivered at the arsenal whenever the commandant should require them. The claimant argues that this service was of a kind that it was not called on to perform as a common carrier and that it would have fulfilled its entire duty as a common carrier if it had delivered the cars direct to the arsenal and on the Government tracks there. It claims that for this unusual service, which was outside the ordinary requirements of its duty as a common carrier, it should receive reimbursement from the United States. No charge was made for the use of the siding and no demurrage charges were incurred since the cars had not reached their destination. The sidings were built on the railroad's right of way, which at this point was between 60 and 80 feet wide. It was contemplated in November, 1917, that very large additional construction would be necessary, requiring the building of many more additional sidings at a cost of about \$50,000. It was found not long afterwards that instead of there being 250 cars a day to handle, only about 65 cars per day would be sent over the line to the Raritan Arsenal.

5. The claimant alleges that the construction of the siding was known to the officers at the arsenal; that they saw it while it was being constructed; that they knew it was being built for the benefit of traffic at the arsenal; and that its use was solely for the accommodation of freight destined to the arsenal.

#### DECISION.

1. The claimant does not contend that there was an express request or direction on the part of any Government officer to build the siding at the place where it was built, or that there was any express promise to pay for the cost of construction. It does contend that the circumstances under which the siding was constructed, coupled with the use of the siding for Government purposes gives rise to an implied promise on the part of the United States to reimburse the claimant for the cost of construction.

2. The main difficulty with the claimant's case is the indefiniteness of the statements alleged to have been made by the officers of the United States. The claimant falls short of showing that any Government officer directed or requested it to construct the siding at the place where it was constructed. A knowledge on the part of

the officers at the arsenal that the siding was being constructed by the claimant, even if we were at liberty to make the inference that the officer knew that the siding was being built to aid the railroad in handling the increased amount of traffic destined for the arsenal, is not enough to impose an obligation on the United States. We can not find that there was any implied promise or obligation on the part of the Government to reimburse the railroad for the cost of construction of this siding, in the absence of evidence showing a definite request, instruction, or direction on the part of the Government. The evidence does not warrant a finding that the Lehigh Valley Railroad Co. was given carte blanche by the Government to construct additional facilities at such places as it saw fit for the purpose of handling an expected increase in traffic, with the understanding or agreement that the United States should reimburse the railroad company for the cost of such increased facilities.

3. For the reasons stated, no relief can be given.

#### DISPOSITION.

A final order will be entered denying the claimant relief.  
Col. Delafield and Mr. Baggarly concurring.



JUNE 18, 1920.

**Case No. 2695.**

*In re* **CLAIM OF THE BRADEN COPPER CO.**

1. **RELEASE.**—Where the Government canceled a procurement order by written notice, which recited that its acceptance would constitute a release to the United States of all claims and demands because of such cancellation, and claimant accepts said cancellation, and there was no mutual mistake of fact such as would authorize a reformation, no relief can be granted to reimburse claimant for certain expenditures.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$367.12 expenditures on canceled contract. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$367.12, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The Braden Copper Co. was the owner in 1918 of a Niles boring and turning mill which was located at one of its plants in Chile, South America. It learned that the Government was in need of a machine of this sort, and although the machine was of use to the claimant it offered to sell it to the Government. After some correspondence procurement order No. P8698-488M was issued, signed by Samuel McRoberts, colonel, Ordnance Department. It called for delivery of the mill on receipt of the order. The purchase price was \$18,000.

3. There was delay in giving shipping instructions and no actual delivery was made of the boring mill to the Government. The claimant had the machine packed and boxed ready for shipment at a cost in labor and material of \$367.12.

4. On or about November 25, 1918, Mr. Charles L. McCluskey, who was acting as staff member of the Claims Board, New York district ordnance office, called at the office of George C. Thomson, purchasing agent of the claimant company, and arranged for the cancellation of the procurement order of May 25, 1918.

The following letter was delivered to Mr. Thomson by Mr. McCluskey:

“NOVEMBER 25, 1918.

“1. Referring to the order dated May 25, 1918 (procurement order War-Ord.-P8698-488M), the United States of America acting through the undersigned, under direction of the Chief of Ordnance, hereby informs you that said order is canceled.

“2. No further performance by you of this order will be required, and your acceptance of this cancellation will constitute a full release to the United States of all claims and demands whatsoever arising out of such cancellation. Wire this office your acceptance of this cancellation and indorse and return the inclosed copy in the manner indicated thereon.

“3. Any communication in connection with this cancellation should make reference to War-Ord.-P8698-488M; PM.

“UNITED STATES OF AMERICA,  
“By WILLIAM WILLIAMS,  
“Lieut. Col., Ord. Dept., U. S. Army.”

5. The claimant accepted the proposed cancellation in the following letter:

“You are advised that this company hereby accepts this cancellation as per the attached letter.

“BRADEN COPPER CO.,  
“By G. G. THOMSON,  
“Purchasing Agent.

“DECEMBER 18, 1918.”

6. The affidavits of Mr. McCluskey and of Mr. Thomson to the effect that the form of the letter of November 25, 1918, was not of the sort adapted to the claimant's case, and it was not known at the time that the claimant had expended moneys in making ready the boring mill for shipment, have been examined.

We have given the affidavits the same weight that would be given to oral testimony of the affiants. We assume that the facts there stated are true.

#### DECISION.

1. The insuperable difficulty in the way of giving relief is that the Braden Copper Co. has accepted a cancellation of its contract with the United States in accordance with the terms stated in the letter of November 25, 1918, which reads:

“Your acceptance of this cancellation will constitute a full release to the United States of all claims and demands whatsoever arising out of such cancellation.”

The form is not ill adapted to the situation. It is not conceivable that a person could misunderstand such plain language.

The United States is unable to make reimbursement to a contractor who has given it a release “of all claims and demands.”

There is no evidence of a mistake of fact common to both parties of the kind that would warrant a reformation of the cancellation agreement or an avoidance of the release.

An individual who has received a release from another individual of all claims and demands may or may not set up the release as a bar to the other's claim.

The United States has no choice in the matter. It is obliged to refuse payment of any claim as to which it is under no obligation by reason of the existence of a valid release.

The not unfounded feeling on the part of the officers of the Braden Copper Co. that its praiseworthy conduct in offering a needed machine to the Government has been ill rewarded can not, of course, affect this Board in its determination of the issues involved.

#### DISPOSITION.

A final order will be entered denying the claimant relief.  
Col. Delafield concurring.

JUNE 18, 1920.

**Cases Nos. 1626 and 1627.**

*In re* **CLAIM OF HUDSON MOTOR CAR CO.**

1. **EXPERIMENTAL COSTS—IMPLIED AGREEMENT.**—Where claimant received three contracts for motors—the first order for 2 experimental motors, the second for 1, and the third for 2,000, all at certain fixed prices—in the absence of a separate express agreement to pay additional experimental costs, claimant's rights are defined and limited by his three contracts and no agreement can be implied whereby the Government is obligated to reimburse claimant such additional costs.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$9,577.52 based upon an alleged agreement relating to experimental costs in the manufacture of three motors for armored tanks. Held, claimant is not entitled to relief.

Mr. Bryant writing the opinion of the Board.

**FINDING OF FACTS.**

The Board finds the following to be the facts:

1. These are two claims arising under the act of March 2, 1919. A statement of claim, Form B, has been filed in each case under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, the two claims aggregating the sum of \$9,577.52, by reason of agreements alleged to have been entered into between the claimant and the United States.

2. In July of 1918, the Government, desiring to increase the speed of the tanks then in use, negotiated with the claimant for the production of a motor suitable for the French Renault tank. Acting upon suggestions and requests of the Government agents, claimant began experiments along this line. The claimant proceeded with work along lines suggested by its own and Government agents and completed and shipped a motor on August 26, 1918, and another on September 3, 1918. It was apparently not until about September 17, 1918, that the Procurement Division issued a procurement order, P-13858-2333-Me, to cover these two motors. The order was dated August 20, 1918, and was for two Hudson Super Six motors, at \$1,000 apiece. It contained the paragraph:

“Delivery of these motors ordered shall be made immediately, unless already made in anticipation of this order. A formal contract is, therefore, unnecessary. This letter, with your acceptance indorsed on the inclosed copy, will constitute the contract.”

3. The claimant did not immediately accept the order. On November 1, 1918, the claimant signed the acceptance and sent it back to the Procurement Division, Ordnance Department.

4. After completing the first two motors, claimant, by direction of Government agents, started to manufacture another motor.

5. Under date of November 11, 1918, a purchase order numbered P-18449-2739-Me was issued for "One Hudson Super Six motor equipped with electric starter, including Bendiz drive and generator, price \$500," to the claimant to cover the third motor and accepted by the claimant on December 11, 1918. This motor had been delivered on September 11, 1918.

6. On September 22, 1918, the claimant received procurement order numbered P-15461-2500-Me for 2,000 motors at \$725 apiece, and motor clutches and spare parts at fixed prices, in accordance with the specifications which had been developed on the three experimental motors. This procurement order was canceled after the armistice. The amount due the claimant was ascertained and accepted by the claimant in full settlement of its rights thereunder.

7. It developed at the outset of claimant's work that the type of motor then being manufactured by it would not fit the Government tanks. The motor had to be redesigned, and numerous other changes were made from time to time. The cost of constructing the three motors was very considerably in excess of the price set in the procurement orders of August 20, 1918, and November 11, 1918.

8. The first two procurement orders were completed by delivery of the three motors described to authorized Government agents in Dalton, Ohio.

9. The claimant's representative being asked at the hearing how the claimant expected to be reimbursed for the excessive cost of the motors, testified:

"The expectations were that we would receive an order for a large quantity of motors knowing the merits of our motors, and that we could amortize such additional expenditures against profits derived from future orders. We could have done that, but on our receiving the future orders it was canceled with the signing of the armistice."

10. The claimant has been paid \$2,500, the price named in its two purchase orders for the three motors. The present claim is for the excess cost of building the motors over the purchase price.

#### DECISION.

1. We do not find in this case any agreement by Government officials to pay the claimant any sums for the construction of the three experimental motors except the purchase price set out in the formal procurement order.

2. It is clear from the testimony of the claimant's witness that it did not understand that it had any such agreement, for it expected to amortize the excess cost in a contract for a quantity of motors.

3. The claimant received procurement order for a large number of motors, as expected. This was terminated at the armistice. Claimant has been compensated in respect thereto.

4. It is likely that on account of the armistice the claimant was not able to amortize its expenses to the extent it had hoped, but that fact does not change the relations of the parties or create an obligation where none existed.

**DISPOSITION.**

Final order will issue denying relief to the claimant.  
Col. Delafield and Mr. Low concurring.

JUNE 19, 1920.

**Case No. 2734.**

*In re* **CLAIM OF T. M. WINDHAM.**

1. **JURISDICTION—TIME OF FILING CLAIM.**—This Board has no jurisdiction of a claim under the act of March 2, 1919, which was first presented on May 24, 1920.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$871, based upon an informal agreement in relation to wool. Held, claim was filed too late.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 28, 1919, for \$871, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Claimant alleges that on June 12, 1918, he delivered to H. P. Roddie & Co., of Brady, Tex., agents of Charles J. Webb & Co., of Philadelphia, Pa., 4,860 pounds of wool for which he was to receive payment in accordance with the terms of the Government regulations for handling the wool clip of 1918 as established by the Wool Division, War Industries Board, May 21, 1918; that under these regulations claimant should have received 60 cents per pound for said wool; that W. F. McCulley and Witcher Produce Co., both of Brownwood, Tex., offered claimant 60 cents per pound "net in the grease" for this wool; that claimant should have received a total of \$2,916, whereas he was allowed only \$2,045, leaving a balance of \$871 due him by reason of improper grading.

3. Claimant's first presentation of this claim to the Government was on May 24, 1920, as evidenced by his affidavit of June 7, 1920, in which he says:

"The presentation of this claim was not made prior to May 24, 1920."

This affidavit was furnished by claimant in response to a request from this Board dated May 29, 1920, for evidence showing a presentation of this claim to some department, official, or agent of the Government prior to the presentation made to this Board on May 24, 1920.



## DECISION.

1. It is neither necessary nor proper for the Board of Contract Adjustment to express any opinion concerning the alleged improper grading of the wool or the failure of the Government or claimant's consignee to pay claimant the amount alleged to be due, in view of the fact that this claim was not presented to the Government within the presentation period fixed by law.

The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and in so doing must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 19, 1920.

**Case No. 1144.**

*In re* **CLAIM OF CYRUS FRENCH WICKER.**

- 1. WRITTEN CONTRACT—CANCELLATION FOR FAILURE TO DELIVER AT TIME SPECIFIED.**—Where claimant's contract to sell and deliver a quantity of castor beans to the Government was canceled by reason of claimant's default in delivery, claimant is not entitled to reimbursement for loss sustained in his efforts to perform such contract.
- 2. INFORMAL CONTRACT—EVIDENCE OF.**—The claimant is not entitled under the act of March 2, 1919, to reimbursement for loss sustained in his efforts to perform an alleged informal contract to furnish the Government a quantity of castor beans, where the evidence fails to show that the Government intended to enter into such a contract.
- 3. CLAIM AND DECISION.**—This claim for \$14,412.75 arises under the act of March 2, 1919, by reason of certain agreements alleged to have been entered into between the claimant and the Government. Held, claimant is not entitled to relief.

Mr. Williams writing the opinion of the Board.

**FINDINGS OF FACT.**

This claim was filed under the act of March 2, 1919. Statement of claim, form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$14,412.75 by reason of certain agreements alleged to have been entered into between the claimant and the United States. The facts of the case are as follows:

1. By a certain formal contract, No. 3283, dated March 18, 1918, incorporating a certain order, No. 73042, dated March 19, 1918, the petitioner entered into a contract with the United States (O. R. Ewing, 1st lieut., A. S., Sig. R. C., contracting officer) by which petitioner undertook and agreed to sell and deliver to the United States "2,000 to 5,000 bushels of castor beans, reasonably suitable for castor oil for Signal Corps purposes, as per specification 3500-A, in sacks of 45 pounds to the bushel, at 9.8 cents per pound, including duty, \* \* \*" which were to be delivered f. o. b. New York City between July 1, 1918, and October 15, 1918. The contract provided, among other things, as follows:

"In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the said party of the first part (meaning the Government) may elect one of the following courses: (a) May rescind

the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order."

The order which is made a part of the contract contained, among other things, the following provision:

"If the contractor is prevented from furnishing beans by reason of floods, earthquakes, fires, tornadoes, or other acts of God, or conditions beyond the possible control of the contractor, including revolutions in Costa Rica, he shall be relieved from his obligation to furnish said beans to the extent to which he has been thus prevented from furnishing the same."

2. At the time the petitioner secured this contract he was an employee in the Naval Intelligence with duties in Costa Rica. A few days after he secured the contract he sailed for Costa Rica and there, after a short time, began the planting of castor beans in order to supply the quantity called for by the contract. It is alleged that in the beginning there were certain interruptions in this work on account of some political disturbance in Costa Rica, but petitioner believed sometime in May that he would be able to secure, later on, larger quantities of castor beans from plantings which he had already made or which he was in a position to make, and the following correspondence took place between him and the Bureau of Aircraft Production with reference to a larger contract.

(a) Telegram from petitioner at San Jose, Costa Rica, May 15, 1919, to the Signal Corps, Washington, as follows:

"Situation here warrants contract for 1,000 to 3,000 tons castor beans delivery during January. February, March, sacked, New York.

"Seed now ready here.

"Cooperation large planters can be arranged conditionally upon securing definite suitable contract, price similar order, No. 73042, or better, in order to plant immediately, and the land is prepared.

"Reference Capt. de Milhau.

"Returning next month Washington but request you address me here."

(b) Petitioner received no response to this telegram and on May 25 sent the following telegram to the Chief Signal Officer, Washington:

"Is offer May 15 satisfactory? Please telegraph if it can be arranged."

(c) Petitioner then received telegram dated May 27 from the Bureau of Aircraft Production, as follows:

"Can not increase contract on same basis."

(d) On May 30 petitioner wired again:

"Referring to your telegram of the 29th. Please telegraph best offer you can make 1,000 to 2,000 tons delivery during next 12 months. Immediate reply important to save planting season."

(e) The Bureau of Aircraft Production wired petitioner under date of June 30, 1918, as follows:

"Referring to your cable of May 20 (?) after you begin satisfactory deliveries under existing contract your further offers at \$3 per 46-pound bushel f. o. b. Costa Rican ports including all charges will be considered. Writing."

(f) Thereafter petitioner received a letter from the Bureau of Aircraft Production dated May 25, reading as follows:

"It is noted that you think you could deliver from one to two thousand tons of castor beans at the same price as is called for in your contract to furnish the Signal Corps from two to five thousand bushels.

"It will be impossible for this office to consider contract for an additional quantity at the present price of your contract.

"Other contracts of castor beans have been made by this office in the West Indies at a price of \$3 per 46-pound bushel, port of shipment.

"If you are interested in these terms it is thought negotiations might be closed for your selling an additional quantity to the Government.

"Full report from you is desired as to the dates of shipment of the quantity you anticipate supplying under present contract."

3. Petitioner alleges that in reliance upon the foregoing correspondence he continued his plantings through May and June so as to put out about 1,000 acres of castor beans, whereas between 200 and 250 acres would have produced sufficient beans to supply the beans called for under the written contract; and petitioner alleges that subsequently there was made an informal agreement for the supplying of an additional 15,000 bushels of castor beans, and an extension of his original contract which authorized him to supply the quantity called for under the written contract in a reasonable time after October 15, 1918.

4. Petitioner returned to the United States in the early part of September, 1918, and called on the Bureau of Aircraft Production and conferred with Mr. Herz, who had charge of the Castor Oil Section, and with Lieut. Grant, his assistant, and also had some conversation with Major Mayer, in charge of the Production Division of the Castor Bean Section. It is out of these conferences which were

held between petitioner and the officers named, and also as a result of several conferences with Capt. O. R. Ewing, the contracting officer, that it is alleged that there was an informal agreement for the supplying of the 15,000 additional bushels of castor beans by August 1, 1919, and an extension of the formal contract. There was a great amount of evidence taken at three separate hearings on this matter, and many variances between the petitioner and the Government officers in respect to detail. It would be extremely tedious to detail to any extent the evidence adduced with respect to the conferences between the petitioner and Mr. Herz and Lieut. Grant, and the incidental conversation with Major Mayer on September 16, out of which there arises the claim upon the part of petitioner that the Government agreed to extend for a reasonable period the time for delivery of the 2,000 to 5,000 bushels of castor beans under the formal contract. The Government officers are all one way in saying that no such extension was granted, while the petitioner maintains that the period for the delivery of the beans under the formal contract was extended for a reasonable period upon the condition that petitioner would accept, in respect to such beans, the then prevailing price of \$3 per bushel at the Costa Rican ports instead of the price of 9.8 cents per pound (\$4.50 per bushel) f. o. b. New York, which was the contract price. Petitioner alleges, further, that in the early part of October, 1918, Maj. Mayer informally agreed to purchase 15,000 additional bushels of castor beans, subject to future determination of price, and the price was later determined upon, on the 17th of October, and the agreement was confirmed and petitioner subsequently applied for a bond for the purpose of executing contract for the supply of this number of additional beans. This testimony in every respect is stoutly denied by Maj. Mayer, who says that the extent to which the Government went was to make a statement of the attitude of the Government with respect to the purchase of beans, and that all that was said on the 17th of October was the price that the Government was willing to pay for the beans, and further says that he told petitioner that if he desired to make any contract for castor beans in Costa Rica he would have to make it with the Baker Castor Oil Co., of New York, who had a contract for supplying beans. This evidence has been examined minutely and with great care, and this Board has reached the conclusion that petitioner's formal contract was not extended as to the time of delivery, nor was there any agreement to purchase 15,000 additional bushels of beans from petitioner.

5. The negotiations between petitioner and the Government officers with respect both to the new contract for 15,000 bushels and the extension of the old contract culminated, on October 29, 1918, in

the following letter from petitioner to Lieut. O. R. Ewing, who was the contracting officer, as follows:

"In accordance with a recent conversation with Major Mayer, of the Castor Bean Section of the Bureau of Aircraft Production, I desire to apply for the cancellation or extension of order No. 73042, under contract No. 3283, for the furnishing to the Signal Corps of 2,000 to 5,000 bushels castor beans at 9.8 cents per pound, delivery to be between July 1 and October 15, 1918.

"It has unfortunately proved physically impossible to make delivery within this short time allowed. I have planted a sufficient acreage to more than fulfill the contract within the next few months, but the planting was not commenced in time to allow for October delivery. The chief reason was revolutionary outbreak in Costa Rica during March and April of this year, which, although with no serious consequences from the actual fighting, led to the impressment of thousands of laborers and caused many more to take to the hills to avoid conscription. Ordinary planting could not be started for that reason until late in May and June, too late for harvesting before December.

"I have over 1,000 acres under cultivation with castor beans, planted under this contract with the Signal Corps, the first shipments from which can be made in December next. I can fulfill the maximum under the contract before the end of August of next year, up to which time I understand the Signal Corps is now making contracts for delivery of castor beans. I therefore request that the present contract be canceled and the bond returned, and a new one made to cover such future deliveries, or that the Government will exercise clause V of the contract, section d, and permit me to complete delivery in accordance with the contract within a reasonable time after October 15. I have also arranged, if a contract can be arranged, to undertake at once new plantings, so as to largely increase my production before August 31."

6. In response to this letter, the petitioner received the following notice from Capt. O. R. Ewing, contracting officer, under date of October 31:

"1. Your attention is called to order No. 73042, which is covered by contract No. 3283, providing for the sale to the Government of 2,000 to 5,000 bushels of castor beans. The above order contains a provision stating that delivery of the beans covered by this order should be between July 1, 1918, and October 15, 1918.

"2. In view of the fact that you have delivered no beans under this contract, you are hereby advised that the same is canceled.

"3. This will acknowledge receipt of your letter of October 29, 1918, giving your reasons for failure to fulfill the contract within the time specified."

7. The evidence shows that petitioner gathered between January and April, 1919, from his plantings about 250 or 300 bushels of beans, which he sold on the open market, and that during the same period he purchased in the open market, mostly from a man by the name of



Angel Caligaris, of Nicaragua, 35 or 40 tons of castor beans, which he also sold in the open market, and that up until July 31, 1919, he made no tender of any beans to the Government of the United States. On the latter date, however, he wrote the Bureau of Aircraft Production the following letter:

"I beg to inform you that I am ready to deliver up to 15,000 bushels of castor beans, reasonably suitable for castor oil for Signal Corps purposes, as per specification 3500-A, before August 31, 1919, f. o. b. New York, duty paid, at the price of \$4.50 per 46-pound bushel, to the aggregate amount of \$67,500, in accordance with the agreements entered into between myself and officers of the Bureau of Aircraft Production on or about September 16, 1918, confirming the previous correspondence with this bureau during May, 1918, and amended as to price and confirmed and accepted on or about October 17, 1918.

"Also I am ready to make delivery of approximately 5,000 bushels of castor beans within 60 days from date from my plantations in Costa Rica at the price of 98 cents per pound, duty paid, New York, to the aggregate amount of \$22,540, in accordance with agreements entered into between myself and officers of the Bureau of Aircraft Production of approximately the same dates and the agreement entered into with contracting officers Capts. F. D. Schnacke and O. R. Ewing on or about October 30, 1918, for an extension of time for delivery of 2,000 to 5,000 bushels castor beans upon furnishing proof that the delay in planting castor beans on my plantations in Costa Rica was caused by shortage of labor during the planting season as a result of revolutionary disturbances in that country.

"I have been ready since January, 1918, to commence deliveries under these agreements, and made a verbal tender of these amounts of castor beans within the times specified in May of this year, but was given to understand that the Government did not desire to accept the beans at the price contracted for, and was also informed that the agreements above mentioned, not having been executed in the manner prescribed by law, were of doubtful validity, and directed to present claims for relief to the Claims Board, Air Service, and to the Board of Contract Adjustment, under the act of Congress approved March 2, 1919, known as the Dent Act, which I have done.

"As there remains sufficient time in which to complete delivery of the total amounts contracted for within the times specified, I desire to hereby make full and formal tender of delivery of the quantities of castor beans above mentioned at the price and within the times specified in the respective agreements, requesting notification in writing if the Government now desires these castor beans, in which case I shall at once undertake the further expense of sacking, shipping, and delivering the beans now available on my plantations in Costa Rica."

8. The evidence shows that when this letter was written petitioner had on hand no beans which he could deliver to the United States, and had not seen or heard from his crop in Costa Rica since he left there about the 1st of May, 1919.



## DECISION.

1. The contract of March 18, 1918, was a formally executed contract. We think that the fact that the order, which was incorporated in the contract by reference was dated March 19 makes no difference. Nor is it informal, as contended by petitioner's counsel, for the reason that it was not signed by the Chief Signal officer. It did not require the signature of the Chief Signal officer, but merely his approval, and it appears upon the face of it that it was approved by the Chief Signal officer. Nor do we think that the fact that the price mentioned in the order was 98 cents instead of \$0.098, or 9.8 cents per pound makes the contract informal. This is a typographical error which might easily have been corrected, and nobody was misled by it. The provision in the order that petitioner might be relieved from supplying the beans to the extent that he was prevented by revolutions was inserted as a protection to the petitioner as against his obligation to supply beans, and the happening of such a revolution would not operate as creating a liability on the Government to extend the time of delivery. Nor was there any obligation upon the part of the Government under Article V of the contract to extend the time of delivery of the beans in case petitioner was prevented by any cause from supplying the beans in the time mentioned; Article V merely gave the Government the privilege of exercising certain options, and it could extend the time of delivery or not as it saw fit. It is very clear that the Government did not exercise this option to extend the time of the delivery of these beans in such manner as that such suspension might in any sense be said to have been under the terms of the contract itself.

2. If the conference of September 16 between petitioner and Mr. Herz and his assistant, Lieut. Grant, and the conversation with Maj. Mayer at the same time, had amounted to anything it would have amounted to a separate informal agreement for the purchase of from 2,000 to 5,000 bushels of beans in a reasonable time, at \$3 per bushel, Costa Rican ports. This Board is of the opinion, however, that there was no such agreement made. Even if petitioner's testimony were of that clear and distinct character essential to a statement of a positive agreement or obligation, the testimony of Mr. Herz, Lieut. Grant, Maj. Mayer, and Capt. Ewing is quite sufficient, together with circumstances attending the entire transaction, we believe, to justify any impartial board in reaching the conclusion that no such informal agreement was made. We are convinced that the most that the Government officers did was to state the prevailing price the Government was paying for the beans and to evince a disposition to purchase at that price from anyone who had beans to deliver. There was no meeting of the minds in any sense that created any obligation upon the part of the Government

to take any beans that petitioner might deliver. Not only is this in accordance with the testimony of Government officers, but in line with their entire conduct in the premises, as is clearly shown by the evidence. Indeed, the letters and telegrams from the Bureau of Aircraft Production as well as the statements and conduct of the Government officers very clearly show that they did not intend to make any contract with this petitioner until he could show that he was able to produce beans, which he had so far failed to do, and this applies not only to any extension of his contract, so called, but as well to any other agreement for the supply of beans.

3. Nor was there any agreement of any sort entered into which obligated the Government to purchase from petitioner 15,000 additional bushels of beans. Mr. Wicker says at one place in the testimony that this matter of the additional bushels was discussed on the 16th of September, and he says in another place that it was not discussed at all until Mr. Cox, the British consul from Costa Rica, met him and they discussed it with Government officers about the second week in October. Petitioner says that at that time the price was not mentioned because a higher price was being discussed and that when he met Maj. Mayer in New York on the 17th of October, Maj. Mayer told him what the price was, namely, \$4.50 per bushel delivered New York, and that thereupon he inserted in his application for the bond the price which had theretofore been left blank. This testimony is stoutly denied by Maj. Mayer, who says that he never gave petitioner any contract for the 15,000 bushels, nor ever instructed him to get a bond and never told him to insert the price in the bond, but merely announced to petitioner, as he announced to many other parties, what the prevailing price was that the Government was paying for beans and the new price which had been adopted. It may be, and there is some evidence to show, that petitioner expected to get a contract for 15,000 bushels of beans, but it is certain that he never got it either formally or informally.

4. Petitioner, in discussing the letter which he wrote Capt. Ewing on October 29 asking for a cancellation, says that his intention was to cancel the old contract, which had expired by limitation, in order to release the outstanding bond, and for the purpose of having a new contract issued taking care of the extension of the old and the incorporation of the new 15,000-bushel contract. In the light of the evidence we think it makes no difference what his intention was, although it must be admitted that petitioner was laboring under some difficulty in respect to the outstanding bond upon a contract which had expired by limitation and upon which he was liable. At the time this letter was written the Government of the United States had the right either to cancel petitioner's contract because of the expiration of the time limit for the supplying of the beans or to proceed against him upon the bond which he had given upon his default.

This was a situation which petitioner was not willing to let continue, and his letter of October 29 was an effort to get released from existing obligations and to create others which he hoped to get. Since there had been no informal agreement to extend his formal contract, or, in other words, to purchase from 2,000 to 5,000 bushels of beans in a reasonable time, or to purchase an additional 15,000 bushels of beans by July 31, 1919, there was no obligation upon the Government of the United States at the time of the receipt of the letter of October 29 to tell petitioner that his formal contract was canceled or to take any action in respect to it unless it saw fit to proceed against him upon the bond which he had given.

5. It must be borne in mind also that the contract which the petitioner had and the contracts which he was seeking to get were not contracts for the growing of beans in Costa Rica or in any other place, but they were contracts for the purchase of beans. In a legal sense it made no difference to the Government of the United States where he got them, whether he purchased them in the open market or whether he raised them, so long as he lived up to his obligations, and when he failed to supply them in the time in which he agreed to supply them there remained no obligation whatever upon the United States to extend his contract or to give him a new one. That the petitioner may have lost money in planting a crop which was put in too late to supply the beans, and thereby has undoubtedly suffered some loss because of his inability, if that is a fact, to dispose of the beans so produced, must not be overlooked; yet at the same time this is not a result which can in any way be attributed to any Government officer.

6. It is not deemed necessary to comment at length upon petitioner's conduct subsequent to the cancellation except to say that no tender of any beans was ever made in reliance upon any informal contract or any extension of the formal contract until July 31, 1919, although in the meantime petitioner had gathered or purchased in the open market and disposed of about 45 tons of castor bean seeds. In the light of the evidence we think that the so-called formal tender of July 31, 1918, is, to say the least, a polite fiction, because at that time petitioner had no beans which he could deliver, but explains in the evidence that at that time he could have secured the beans therein mentioned from his then growing crops, although he had not seen them or heard from them since about the 1st of May, 1919.

7. For the reasons above stated, this Board is of the opinion that the petitioner is not entitled to recover in any amount in this case.

#### DISPOSITION.

A copy of this decision will be furnished the Claims Board, Air Service, for its information.

Col. Delafield and Maj. Farr concurring.

JUNE 19, 1920.

**Case No. 653.**

*In re* **CLAIM OF CHARLES BAKER CO. (INC.).**

1. **RECOMMENDATION OF AWARD.**—The recommendation of an award of a contract does not amount to an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,317.75, based upon an alleged agreement for the manufacture of wool trousers. Held, claimant is not entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. The claim is presented in affidavit form, and it is based upon an agreement alleged to have been entered into between claimant and an agent of the Secretary of War. The claim comes to this Board on appeal from the zone board of review, Zone No. 1, Boston, Mass.

A hearing was held in the case on February 16, 1920, but this hearing was continued in order to give claimant an opportunity of preparing its case and furnishing additional evidence. On June 16, 1920, claimant notified this Board that it was willing to have the case decided upon the record as it stands at present.

**STATEMENT OF FACTS.**

1. On July 29, 1918, claimant entered into a formally executed contract, No. 4993-B, with A. W. Yates, Colonel Quartermaster Corps, United States Army, for the manufacture and delivery of approximately 50,000 pairs of wool trousers. Claimant continued the performance of this contract until it was suspended immediately after the armistice, when approximately 40,000 pairs of trousers had been manufactured and delivered.

2. Claimant contends that about the latter part of October or early in November, 1918, it was given an additional contract for 50,000 pairs of wool trousers, and to establish the fact of the placing of this order or letting of this additional contract relies upon the following allegations:

“(a) That Mr. Charles Baker, president of the claimant corporation, was personally told by Frederick I. Barth, of the Production Division quartermaster depot, New York City, that claimant corporation was listed for 50,000 additional pairs of trousers.

"(b) That notice of award for the additional order or contract was published in the Daily News Record, which is a trade paper in which all contracts with the Government were customarily announced.

"(c) That notice of the placing of the additional order or contract was given claimant in a letter signed by Lieut. Lawrence Mann, dated November 2, 1918."

3. Claimant alleges that, believing that it had received or would receive the additional contract, it, prior to November 11, 1918, leased additional premises for one year at a rental of \$3,313.75, and that upon the same belief it made additional preparations and disbursements for the manufacture of trousers, which were greater than necessary for the completion of the formal contract under which it was already operating.

4. As to allegation (a), above, Mr. Frederick I. Barth denies the statement attributed to him, and states that all he told Mr. Baker was that the placing of an additional contract with claimant corporation was under consideration.

5. As to allegation (b), above, it is sufficient to say that the Daily News Record is not an official Government publication, and news articles appearing in it can in no way give rise to an obligation or contract on the part of the Government in the absence of evidence that the notice was officially published for that purpose, which is not shown.

6. The letter referred to in allegation (c), above, can not by any construction be interpreted as more than giving claimant notice that it had been *recommended* for an award of an additional contract.

7. The records of the Clothing and Equipage Division, Quartermaster General's Office, show that on October 31, 1918, a procurement order was prepared and approved for the placing of an additional order of 50,000 wool trousers with claimant, but this order was never mailed and, according to the testimony of Mr. Baker himself, never reached the attention of claimant until several months after the filing of this claim, so that claimant did nothing on the faith thereof.

#### DECISION.

1. In our opinion the claimant has failed to establish an agreement within the act of March 2, 1919. The evidence shows no more than that claimant had been recommended for a second order for 50,000 wool trousers. In anticipating the execution of the contract for this order, and in incurring expenses and obligations, the claimant proceeded at its own risk. Claimant was never expressly told that it would receive a contract, nor was it requested or authorized

to make preparations and incur expenses or obligations in anticipation of a contract. Neither do the facts and documents presented to the Board warrant the finding of an implied agreement or authority for claimant so to proceed.

DISPOSITION.

An order denying relief will be issued.  
Col. Delafield and Mr. Hope concurring.

JUNE 19, 1920.

**Case No. Sales BCA-8.**

*In re* **CLAIM OF LOUIS S. WANDELL & CO.**

1. **JURISDICTION.**—The Secretary of War has no authority to adjust a claim for damages based upon the breach of an informal contract made after November 12, 1918.
2. **INFORMAL CONTRACT—SALES.**—No regulations have been prescribed by the Quartermaster General, pursuant to section 6853b, Compiled Statutes, regulating sales of surplus property, and when not executed in accordance with section 3744, Revised Statutes, is an informal contract.
3. **CLAIM AND DECISION.**—Claim under General Order 103 for \$76,570.30 damages on sale contract. Held, no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under General Order 103 to adjust a dispute under the terms of a contract between the claimant, Louis S. Wandell, and the Surplus Property Division, office of the Director of Purchase and Storage, by the terms of which the Government sold certain candy. This claim was received by this Board from the Surplus Property Division, office of the Director of Purchase and Storage, for adjustment of this dispute.

**FINDINGS OF FACT.**

1. Under date of October 2, 1919, as a result of negotiations carried on by the claimant with Col. L. M. Purcell and Col. William Elliott, of the Surplus Property Division, an offer in writing was made by Louis S. Wandell on behalf of the claimant for the purchase of certain surplus candy, then held in storage under the jurisdiction of the zone supply officer, New York, at "70 per cent of the money value as shown by attached list for such quantity as is in salable condition."

2. Under date of October 2, 1919, a letter of acceptance of bid from the Surplus Property Division was forwarded to Wandell & Co., containing the following statements as to the quantity and price:

"Miscellaneous lots of candy located in the New York zone."

It further states:

"Quantity and cost price is shown by schedule 1, hereto attached as a part hereof."

The price is shown as "70 per cent of the cost price to the Government, as shown by schedule attached."



3. The schedule attached to this letter of acceptance contained several corrections, and was subsequently revised so as to show a total quantity of candy which cost the Government \$768,556.09 and for which the claimant was to pay \$537,989.26.

4. The full amount of candy listed upon the above-mentioned list was not actually delivered to claimant, and claimant now seeks to recover damages resulting from the breach of contract on the part of the Government.

5. The amount of these damages was estimated by claimant at \$31,649.37 which represents the profits which the claimant company alleged would have been made had there been a delivery of the candy purchased from the Government at 70 per cent of the Government cost price as stipulated in the letter of acceptance. The claimant's loss was occasioned by the withdrawal by the Government of certain candy from this contract and may be considered under five items as follows:

"Item No. 1 covers \$174,314.10 worth of hard candy and Jordan almonds withdrawn from claimant on October 11, 1919. On this withdrawal it was arranged that claimant be compensated for the withdrawal and that this compensation should take the form of replacement of goods selected by and satisfactory to Wandell & Co. This replacement was made to the extent of \$113,587.61 leaving a balance of \$60,726.49. Claimant alleges that if the goods withdrawn had been at their disposal during the season when goods of this character met with greater sale—that is, around Christmas—they would have been profitably sold and, therefore, their compensation would have been to the extent of at least 30 per cent; that is, 30 per cent of \$60,726.49.

"Item No. 2 covers 20,850 cartons of Touraine bars which were included in claimant's contract of October 3, 1919, but which had been sold to the firm of J. C. Brady & Co. prior to the execution of this contract with the claimant. Claimant again claims right to compensation to at least the amount of 30 per cent, representing the minimum amount they would have made in profit had these goods been delivered.

"Item No. 3 covers certain Lovel & Covell caramels withdrawn from claimant and sent to Government retail stores about November 5, 1919. Claimant again claims 30 per cent compensation for the profit lost through this withdrawal of candy from their contract.

"Item No. 4 covers certain Wallace assorted chocolates which were added to claimant's contract as compensation in part for the first lot of goods, item 1, withdrawn from them, but which chocolates were never delivered to claimant. On this item claimant alleges a loss of at least 30 per cent profit.

"Item No. 5 covers certain Powell cream cakes withdrawn from the claimant and sent to the Government retail stores about December 1, 1919. These goods had all been sold by the claimant to Butler & Bros. at 30 per cent increase on the price paid to the Government. Claimant again asks damage of 30 per cent."

6. As to the above five items claimant alleges that they would have received and, in fact, had contracts which would net them a profit of at least 30 per cent on all this candy withdrawn by the Government.

7. Wandell & Co. also seek to recover \$44,920.93 based upon their failure to receive goods under an option which was given to them on certain other quantities of candy, which had been declared surplus.

8. This option was given orally by Col. Purcell to the representative of the claimant company on or about October 3, 1919, and was to expire October 7, 1919. The existence of this option was not recognized by the zone office in New York, so on October 6 claimant wired Col. Purcell for confirmation of its existence. This confirmation was given by telegram from Col. Purcell dated October 7, 1919, to claimant, as follows:

"Reference your telegram October 6. Understanding was granted you four days' option from Friday night, October 3."

Upon receipt of this telegram on October 7, claimant handed a letter to the zone surplus property officer at New York and mailed a copy to Col. Purcell in which they elected to take advantage of the option on certain goods which they specified in their letter. This candy was later withdrawn from surplus on instructions from Washington for overseas shipment to the United States troops in Germany.

#### DECISION.

1. As to the contract, this Board is of the opinion that the Government did not make delivery in accordance with the terms of its contract, but failed to deliver the total amount of candy sold to the claimant.

2. Claimant had the privilege of refusing to accept the candy under its contract or of returning it to the Government and thereupon rescind the contract entirely. Claimant did not choose to repudiate the contract altogether and accepted the candy as stated in the contract in part and now seeks to recover damages. Claimant has not and can not now offer to rescind because he disposed of the property and now claims damages for breach of the contract by the Government.

3. This Board is also of the opinion that the Government did not comply with the terms of the option, but failed to deliver the candy to which the claimant was entitled to delivery under its option.

4. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853B, Compiled Statutes. This contract and option are, therefore, not within the exceptions to section 3744, Revised Statutes, but are informal.

5. It is the opinion of this Board that the Secretary of War has no authority to adjust claims for damages based upon a breach by the Government of informal contracts not coming within the provisions of the act of March 2, 1919.

6. This Board is, therefore, without authority to grant relief sought by claimant. The claim is accordingly denied.

DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 19, 1920.

**Case No. 2685.**

*In re* **CLAIM OF J. FERBER.**

1. **EVIDENCE.**—Where claimant's witness testifies that a certain Government representative told him that claimant was to receive a clothing contract and should acquire necessary facilities for the performance thereof, and the Government representative's testimony contradicts claimant's witness, the disputed question of fact may be determined by considering the surrounding circumstances and the probabilities arising from such circumstances.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,225.75, based upon an alleged oral agreement relating to the manufacture of convalescent suits. Held, claimant is not entitled to relief.

Mr. Averill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,225.75 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant's petition was filed on June 12, 1919, and a hearing has been had in the matter, at which time both the claimant and the Government were represented by attorneys.

3. Claimant in his petition states that:

"On or about October 5, 1918, we entered a bid for convalescent suits at \$1 each. This bid was sent to the office of the quartermaster, 109 East Sixteenth Street, New York City. About 10 days later we were informed by Mr. Tulley of the Quartermaster's Department, Clothing and Equipage Division, that a contract for thirty thousand (30,000) convalescent suits was awarded us, and we were to expect same from Washington. On that strength we went to the expense of equipping our plant with machinery, for which, as above stated, bills were sent to you."

4. The record shows that under date of October 18, 1918, the Manufacturing Branch of the Clothing and Procurement Section, Clothing and Equipage Division, issued a procurement request to the Purchasing and Contract Branch for 30,000 suits at \$1 each. However,

before this request was approved or even a contract drawn the armistice was signed and there was nothing further done in the matter.

5. Claimant further states in his petition that he went to the following expenses of equipping his plant, for which he is now claiming compensation subject to the provision hereinafter set forth:

Oct. 25, 1918, Slinger Sewing Machines Co., 6 machines-----	\$784. 20
Oct. 28, 1918, B. Kaiser, 551 West Beavay, 4 double needle machines---	480. 00
Oct. 31, 1918, Ontario Thread Co., 17 Waverly Place, 50 pounds thread--	111. 55
Nov. 8, 1918, United Shirt Co., 421 East One hundred and first Street, 6 machines -----	450. 00
Rent, about -----	400. 00

Total----- 2, 225. 75

While some of this claim is a total loss, I can still realize about 50 per cent of the cost of the machinery, which would make a loss of about \$912, plus a loss of \$400 for rent, which would make my total loss of about \$1,312. This is not the total loss which I sustained on the above contract.

6. Mr. M. E. Markow, general manager of J. Ferber, testified:

"Mr. Bernard F. Tully told us to buy our machinery, to equip our plant, so when we got the contract we don't have to wait any time; go right ahead and make up the suits for the Government. Here is what he told me: 'You are getting a contract of 30,000 convalescent suits. Equip your plant.' That is what he told me."

7. Mr. Bernard F. Tully, an assistant to the Chief of Clothing and Procurement Section, Clothing and Equipment Division, who was at that time stationed at New York City, testified as follows on that point:

"Q. Mr. Tully, Mr. Markow testified that you told him, 'You are getting a contract for 30,000 convalescent suits. Equip your plant. That is what he told me.' Do you recall making any such statement as that?—A. I certainly never did.

"Q. Now, Mr. Markow also testified that Mr. Tully 'told us to buy our machinery, to equip our plant, so when we got the contract we don't have to wait any time, go right ahead and make up suits for the Government.' Did you or did you not give any such instructions?—A. I did not. Do I need to add anything to that?"

#### DECISION.

1. It is a well-known principle that where the testimony given by two witnesses is contradictory, then all the surrounding circumstances will be considered in arriving at a proper conclusion.

2. It appears from the testimony that the Chief of the Clothing and Procurement Section, Clothing and Equipage Division, instituted a policy to be followed at all times and by all of his assistants to impress upon the manufacturer most definitely and clearly

that a recommendation of an award from the Procurement Section was not a contract until such time as the actual contract document itself had been consummated by the depot quartermaster.

3. Mr. Tully testified that it was a well-defined policy of the Clothing and Procurement Section not to recommend a manufacturer for a contract to make clothing whose plant was not properly equipped for its execution, and that he never advised any manufacturer to procure machinery for a contract.

4. The claimant did not allege in his petition that he was told to purchase machinery. This was stated for the first time at the hearing of the claim, which fact in itself negatives the idea that he was advised by Mr. Tully to buy machinery for an anticipated contract.

5. Mr. Tully further testified that from April, 1918, until the signing of the armistice the Clothing and Procurement Section could get production in such unlimited quantities that it could pick its manufacturers who did have the necessary facilities and allocate its requirements to them.

6. The testimony is also clear that there did not exist a condition of emergency on such articles as convalescent suits which would necessitate placing with the contractor oral instructions to proceed to equip a plant for the manufacture of same.

For the reasons *supra*, it is the opinion of the Board that no agreement, express or implied, within the purview of the act of March 2, 1919, was entered into between the claimant and the Government.

8. Relief must, therefore, be denied.

#### DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.

JUNE 19, 1920.

**Case No. 740.**

*In re* **CLAIM OF J. V. STIMSON & CO.**

- 1. SUPPLEMENTAL AGREEMENT.**—Where a letter was addressed claimant directing that in sawing lumber for airplane propellers it should be so done as to save the part left for gunstock fitches and claimant agreed thereto and subsequently accepted a contract for 100,000 feet of airplane propeller lumber; the latter does not constitute a separate contract, but is merged in the contract; the gunstock fitches are incidental merely and on suspension of the contract claimant is entitled to be reimbursed only for such material as was necessary to fill the contract for airplane propellers.
- 2. SETTLEMENT CONTRACT—RELEASE.**—Where all the articles to be produced, work to be done, and material necessary therefor, were produced under and provided for the performance of a particular contract, which has been canceled by a settlement contract, in which claimant released the Government of all claims by reason of or arising out of, or with respect to the articles or work thereby canceled, said contract constitutes a full release of the Government and no further allowance can be made for alleged excess material.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,076.81 for gunstock fitches. Held, claimant not entitled to recover.

Maj. Blackburn writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented under the act of March 2, 1919. Statement of claim, Form B, under Supply Circular No. 17, 1919, Purchase, Storage and Traffic Division, was filed with the War Department Board of Contract Adjustment June 28, 1919, for \$3,076.81, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about August 7, 1918, for sawing walnut gunstock fitches at the price of \$80 per thousand square feet. On November 3, 1919, claimant filed an amendment to his petition, in which the amount of the claim was increased to \$6,515.39. A hearing was conducted by this Board, and counsel for claimant argued the case orally and by written brief.

2. The circumstances out of which the claim arises are as follows: During the year 1918 the claimant, J. V. Stimson, doing business



under the firm name of J. V. Stimson & Co., Owensboro, Ky., was engaged in the business of manufacturing hardwood lumber. Claimant had entered into three contracts with the Government prior to August 7, 1918, for the manufacture of walnut propeller material for aeroplanes. All of these contracts have been completed by full performance, but at least one was in the course of performance on August 7, 1918, on which date a letter from the office, Director of Aircraft Production, signed "Materials Department, Foreign and United States, by J. C. Wickliffe, hardwood section," was addressed to claimant, as follows:

"1. It is imperative that such mills as are cutting propeller walnut for the Bureau of Aircraft Production should make available for sale to mills who have gunstock contracts from the Ordnance Department that part of the log which does not produce desirable propeller walnut. These gunstock flitches should be  $2\frac{1}{2}$  inches in thickness and of a grade that will produce an average of one clear gunstock for every 10 feet board measure of flitch. This grade of flitches can not be produced where propeller material is taken from all four faces of the log. Therefore, this section asks its contractors to manufacture their logs by taking propeller material from the two opposite faces of the log only, and then converting the balance of the log into  $2\frac{1}{2}$ -inch flitches. And it is better not to undertake to cut propeller lumber from 12 and 13 inch logs. They are too small for the purpose and it merely ruins the gunstock flitch to undertake it.

"2. If, by cooperating as outlined above, you will produce these flitches that will cut gunstocks on the 10-foot basis, the Ordnance Department, Production Division, will find a ready sale for same at a price of \$80 per thousand square feet board measure, f. o. b. a near-by gunstock mill.

"3. Please advise if you will so cut your logs in the future."

3. In reply to the above letter, claimant wrote Mr. J. C. Wickliffe, War Department, Bureau of Aircraft Production, on August 15, 1918, the following letter:

"Your favor of the 7th instant received regarding gunstock flitches. Will advise that we will cut as near as possible 10-foot pieces, according to the dimensions required.

"We can not always tell what will make gunstock, but we will use our very best judgment in complying with your request, and we will cut the aeroplane stock and the gunstock flitches to the best advantage we can, considering the logs we have cut.

"We would like to have you send us a scale of prices that you have that we should pay for these logs. Some of our logs have been costing us too much money. This is just recently, but on some logs we have made no profit, but take a chance of a loss."

4. The office, Director of Aircraft Production, issued to claimant order No. 710317, September 28, 1918, for "100,000 feet (approximately) walnut lumber, graded in accordance with specification No. 15030-B, at \$310 per thousand feet, \* \* \* 30,000 feet to be ready for inspection October 1, 35,000 November 1, and 35,000 December

1, 1918." Said order was signed "F. D. Schnacke, captain, Air Service, Aircraft Production." Following this order a formal contract, No. 4866, dated October 1, 1918, approved October 9, 1918, by "Lieut. Col. A. C. Downey, Air Service, Aircraft Production," was entered into between the claimant and the United States, represented by "F. D. Schnacke, captain, Air Service, Aircraft Production." By the terms of said contract claimant agreed to furnish to the Government the material described in order No. 710317 at the price and in accordance with the terms stipulated in said order.

5. Claimant purchased walnut logs for the performance of said contract No. 4866. The exact dates of purchases are not stated, but claimant testified that most of them were purchased in September and October, 1918.

6. On November 18, 1918, a supplemental contract was entered into between claimant and the Government providing for the storage by the claimant of the lumber, inspection and payment by the Government in carload lots, and insurance on the material by the claimant. Otherwise the original contract of October 1, 1918, was to remain in full force and effect.

7. Claimant failed to make deliveries as specified in the contract. The Government thereupon telegraphed claimant as follows:

"BAP. Govt. Paid.

NOVEMBER 29, 1918.

"J. V. STIMSON & Co.,  
"Owensboro, Ky.:

"Owing to your failure to deliver 40,000 feet of the lumber called for in contract 4866 drawn on order 710317 covering 100,000 feet walnut lumber within the time specified therein, you are hereby directed to stop all production on said 40,000 feet of lumber on that order and contract and make no further deliveries thereof and incur no further expense therewith. The Government reserves all its rights under the above-mentioned order and contract.

"AIRCRAFT PROCUREMENT,  
"DOWNEY.

"Approved:

..

"A. C. DOWNEY,  
"Lieut. Col., A. S., A. P."

8. On December 30, 1918, the office Director of Aircraft Production addressed a letter to claimant, as follows:

"1. Reference is made to telegram from this department dated November 29, 1918, instructing you to suspend production of order No. 710317 due to delayed deliveries.

"2. In view of the fact that a subsequent investigation shows you had approximately 35,000 feet ready to deliver prior to December 1, 1918, the Government hereby agrees to accept this amount of lumber with the understanding that you will consent to a cancellation of the balance of the order.

"3. Accordingly, order 710317 is amended to read as follows:

"Item 1. 35,000 feet (approximately) walnut lumber, graded in accordance with specification 15030-B, at \$310 per thousand feet, \$10,938.35."

"By direction of the Acting Director of Aircraft Production.

"F. D. SCHNACKE,

"Captain, A. S., A. P."

On the same date as the above letter a second supplemental contract between claimant and the United States, of date December 28, 1918, was approved by "A. C. Downey, lieutenant colonel, Air Service, Aircraft Production," in which the following stipulations, among others, appear:

"Whereas heretofore on the 1st day of October, 1918, the parties hereto did enter into a contract bearing the contract No. 4866, covering order No. 710317 (which order was dated September 28, 1918), and called for the purchase by the Government from the contractor of approximately 100,000 feet of walnut lumber at a price of \$310 per thousand feet; and

"Whereas on the 18th day of November, 1918, the first supplemental contract to said agreement was executed, which supplemental contract bore No. 4866-1 and provided for the payment of said lumber upon its inspection and acceptance; and

"Whereas the contractor has heretofore delivered to the Government, pursuant to the terms of aforesaid contract, 78,647 feet of lumber, for which the Government has duly paid the contractor; and

"Whereas the furnishing and delivery under said original and supplemental contracts of the remaining 21,353 feet of lumber would exceed the present requirements of the United States, thereby making it to the interest of the Government to cancel the undelivered portion thereof, and amend said original contract as herein provided:

"Now, therefore, in consideration of the terms and the mutual covenants herein contained, it is agreed between the parties hereto as follows:

"ARTICLE I. The contractor agrees to accept cancellation of and shall not furnish and deliver to the United States, and the United States shall not accept and pay for, the 21,353 feet of lumber remaining undelivered under said original contract, and to that extent said original contract is hereby canceled, rescinded, and annulled. It is expressly understood and agreed that the Government has not yet paid to the contractor the sum of \$50 due to the contractor, which has been retained pursuant to the terms of Article II of the first supplemental agreement, and it is hereby agreed that said sum shall be retained by the Government in accordance with the terms of said Article II of said supplemental contract until the lumber covered by these various contracts shall have been put on board lighters or cars by the contractor.

"ART. II. The United States and the contractor, for himself, his successors, heirs, legal representatives, and assigns, do hereby mutually remise, release, and forever discharge each other from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever, due or to become due in law

or in equity, by reason of or arising out of, or with respect to the articles of work hereby canceled, and this agreement shall constitute full and final settlement of all questions and claims growing out of this cancellation.

"ART. III. Except as herein provided, the provisions of said original contract shall remain unchanged."

9. On January 3, 1919, the Office of Director of Aircraft Production, by "F. D. Schnacke, captain, Air Service, Aircraft Production," addressed a letter to claimant, as follows:

"1. Your attention is invited to a letter from this department dated December 30, 1918, amending order No. 710317 to show acceptance by the Government of approximately 35,000 feet of walnut lumber, said acceptance being based upon cancellation of the balance of the order.

"2. In view of the fact that you had approximately 78,000 feet of this lumber ready for delivery prior to December 1, 1918, instead of 35,000 feet as specified in our letter, said letter of December 30, 1918, is hereby rescinded and order No. 710317 amended to read as follows:

"Item 1, 78,000 feet (approximately) walnut lumber graded in accordance with specification No. 1530-B, at \$310 per thousand feet, ———."

"3. The balance of the order is hereby canceled."

10. The Office of the Chief of Ordnance, Production Division, having previously, on August 5, 1918, furnished claimant with a list of manufacturers of gunstocks, addressed a letter to claimant, of date September 4, 1918, as follows:

"This office would be pleased to be advised what disposition you are making of your 2½-inch flitch cut in accordance with instructions from the Bureau of Aircraft Production."

To the above letter claimant replied:

"We are selling to Wood Mosaic Co., of New Albany, Ind."

And claimant testified that he had sold to this company seven carloads of gunstock flitches and two carloads to Kesse, Shoe & Schleyer Co., for all of which he had been paid. He further testified that on receipt of the telegram of November 29, 1918, suspending the contract, No. 4866, October 1, 1918, he stopped sawing walnut material under said contract, and cut no more flitches; that all the flitches he had cut up to that date had been accepted. Claimant acknowledges full acquiescence in the suspension of the original contract, No. 4866, on November 29, 1918, and the subsequent cancellation by the Government on January 3, 1919, of the balance of the order, and the claim as presented does not embrace any item for walnut propeller material or for commitments for walnut logs under said contract No. 4866.

11. At the time the Government ordered the suspension of production under contract No. 4866, on November 29, 1918, claimant had

purchased and had on hand about 175,000 feet of uncut walnut logs, of which 110,000 to 120,000 feet would have been required to complete the unfilled portion of the contract if he had cut gunstock flitches from them. But if he had not cut the gunstock flitches, it would have taken a less number of logs. A Government inspector visited the mill of claimant and made a written report, of date July 12, 1919, in which it is stated that on November 29, 1918, the date of the suspension of the contract, claimant had commitments of walnut logs amounting to 107,835 feet. Claimant had cut some of the logs into domestic material between the date of suspension and the date of the visit of the inspector, which reduced the amount of log feet on hand on the latter date.

12. The hearing in this case was commenced on December 8, 1919, and Mr. J. V. Stimson, the claimant, testified before this Board on that date. After adjournment of the hearing, and after the question of release by claimant of all claims against the Government arose in the case, claimant made an affidavit which appears in the record, bearing date January 23, 1920, in which he states, among other things, referring to Article II of the supplemental contract of date December 28, 1918, in and by which he released the Government from the claims specified therein:

"I did not voluntarily sign the agreement contained in the foregoing provision (Art. II), but was compelled to do so because the Government refused to pay me unless I signed this supplemental agreement. \* \* \* Had I not signed this agreement, my promise to the bank, based on money due me from the Government, would have been broken and my credit ruined. I therefore signed the agreement, contrary to my wishes and solely for the reasons stated above. Furthermore, I did not and do not now construe the above provision as waiving my right under an implied contract now being sued on."

13. The claim in this case is for the gunstock flitches which were never cut, but which claimant claims he could have cut out of the walnut logs which he had purchased for the performance of contract No. 4866 and had on hand on November 29, 1918, the date of suspension of said contract.

#### DECISION.

1. In order for claimant to be entitled to relief, two propositions must be satisfactorily established, first, that the letter of August 7, 1918, from the office of the Director of Aircraft Production to claimant and the reply thereto of claimant of August 15, 1918, constituted an entirely separate and distinct agreement from the contract, No. 4866, of October 1, 1918, and never became merged into or made a part of said contract, and, second, that commitments were made by claimant prior to November 12, 1918, on the faith of said



agreement. The solution of this question is rendered less difficult by the statement of the claim by Mr. C. C. Calhoun, counsel for claimant, made to this Board at the hearing, as follows:

"Mr. CALHOUN. Before proceeding further in the case probably it might tend to clarify it a little to state a little more definitely just what this claim involves. It does not involve compensation for flitches which were cut. It is limited to compensation for the logs which were purchased to fill the unexpired contracts for the aircraft material which was to be furnished. I think that had better be clearly stated and understood now, because there seems to be some misapprehension about it. I will illustrate it this way: Here there was a contract, or contracts, with the Aircraft Board covering a certain amount of material which was to be furnished, and in the production of that material it was necessary to get the logs. It would have required fewer logs to have furnished the material for the aircraft alone than were necessary to furnish the material for the aircraft and the flitches. Mr. Stimson purchased logs for the completion of the aircraft material and the flitches that would go along with the production of that material. The contract with the Aircraft Board was canceled. That left these logs on his hands. Now he is claiming compensation for the loss sustained on the logs which were not cut up into the manufactured article. \* \* \* This covers the claim for all the logs he had on hand which would have been necessary to have completed the aircraft contract and are not applied. I do not know what the auditor has embraced in his report because that is a confidential report and I have not seen it; but I am now speaking of what the claim ought to apply to. It is intended to apply to the logs which he had on hand which had been purchased for the purpose of completing the aircraft contract, and it is only the losses which he sustained by reason of this arrangement, and is not intended to cover the losses sustained by the aircraft contract.

"Mr. MONTGOMERY. Those logs were purchased for the aircraft contract?

"Mr. CALHOUN. Yes; they were purchased for the aircraft contract."

2. Claimant himself seemed to have entertained the same view of the transaction. The following questions and answers are pertinent:

"Mr. CALHOUN. What was your understanding of this letter of August 7, 1918?

"Mr. STIMSON. That they would sell the gunstock material at \$80, what accumulated, that was cut according to their instructions when I was cutting airplane material.

"Mr. BAYNE. How much are you asking the Government to pay you for in this proceeding?

"Mr. STIMSON. I am asking them to pay the difference between the \$310 per thousand feet—that was the price paid for airplane material—and the price that that lumber would sell for in the domestic market."

3. From the foregoing, taken in connection with all the other evidence in the case, it is quite clear that the cutting of flitches for

gunstocks was a mere incident to the cutting of propeller material under contract No. 4866 of October 1, 1918, and that the arrangement was regarded in that light by both the Government and the claimant. The prime object of the contract was the procuring of propeller material, and the secondary object was to procure fitches for gunstocks out of the logs from which propeller material was sawed. Indeed, the letter of August 7, 1918, from the Director of Aircraft Production, and which is relied upon by claimant as a basis for relief, at most, required all mills cutting walnut propeller material to make available for sale for the manufacture of gunstocks only "that part of the log which does not produce desirable propeller walnut." In no sense can this letter be construed as an unlimited order to claimant to go out and stock himself up with walnut logs for the purpose of cutting gunstock fitches. The record is full and complete, and made very definite by claimant, that the relief sought in this proceeding is not predicated upon the contract, No. 4866, of October 1, 1918.

4. But, conceding for the sake of argument, that the letter of August 7, 1918, referred to, and the reply thereto by claimant of August 15, 1918, did constitute a separate and distinct agreement between claimant and the Government, relief must be denied claimant because no commitments were made on the faith of that agreement. The position of counsel for claimant, and which is borne out by the facts in the case, is that all the walnut logs purchased by claimant and which were left on his hands at the time of the suspension of the contract, No. 4866, "were purchased for the aircraft contract." This is emphasized by counsel for claimant as follows:

"Mr. Stimson purchased logs for the completion of the aircraft material and the fitches that would go along with the production of that material."

5. Finally relief must be denied claimant by reason of his release of all claims against the Government "by reason of, or arising out of, or with respect to the articles or work hereby canceled," as appears in Article II of the second supplemental contract, of date December 28, 1918, between claimant and the Government. What "articles" or "work" could have been in the minds of the parties except propeller material and gunstock fitches and the work necessary to manufacture same? The letter of August 7, 1918, is so interwoven with and dependent upon contract No. 4866, of October 1, 1918, that the settlement of that contract necessarily carried with it a settlement of all production called for in connection therewith and of all raw material purchased for the performance thereof. The claimant undertakes to relieve himself of the binding effect of this



release by making affidavit that he did not sign same "voluntarily," but did so "contrary to my wishes." This affidavit was made after the claimant had testified in the case, and the Government has not been afforded an opportunity of cross-examining him in regard to the matter set up therein nor of submitting testimony in rebuttal or contradictory of his statements. However, suffice it to say that the facts stated in the affidavit fall far short of acts amounting to duress. There is no element of constraint by force or fear or threat of imprisonment as a result of which claimant was induced to sign the release. It follows that all rights of claimant to assert any claim against the Government growing out of his undertakings to furnish walnut propeller material and fitches are concluded by the settlement agreement of December 28, 1918.

DISPOSITION.

A final order denying relief will be issued.  
Col. Delafield and Mr. Marcum concurring.

JUNE 19, 1920.

**Case No. Sales BCA-14.**

*In re* **CLAIM OF L. F. ROBERTSON & SONS (INC.).**

1. **JURISDICTION.**—The Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim amounting to \$112.20 referred under General Order 103 for determination of a dispute arising under an informal contract by the terms of which the Government sold claimant certain leather known as belly centers. Held, no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under General Order 103 to adjust a dispute under the terms of an informal contract between the claimant, L. F. Robertson & Sons (Inc.), and the Surplus Property Division, Office of the Director of Purchase and Storage, by the terms of which the Government sold certain leather known as belly centers. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

**FINDINGS OF FACT.**

1. On September 18, 1919, at the public auction held at the Army supply base, Boston, Mass., under authorization from the Chief, Surplus Property Division, dated August 25, 1919, claimant purchased, among others, at 18 cents per foot, lot No. 80, which was listed in the auction catalogue as follows:

“Russet strap, belly centers, lot No. 80; England, Walton Co. (Inc.), tanners; 60 bales; 12,898 feet.”

This catalogue stated among the conditions of the sale that “all leather must be removed from the Government warehouse within 30 days.”

2. By shipping ticket No. 30808 the Boston zone supply office forwarded to claimant on September 7, 1919, among others, 15959½ feet of russet strap belly centers, lot No. 80, 78 packages.

3. Claimant on receipt of shipment reported to the zone supply office that 3,740 feet of the leather billed as belly centers were bellies. It appears that the difference between the two articles is as follows: Bellies are the belly with the front and hind shank attached; belly centers are the belly part only, and are more valuable in the trade than bellies.

4. On March 11, 1920, Joseph Tynan, leather equipment and harness inspector of the Surplus Property Division, general supply depot, New York City, visited claimant's stock room and found there 3,661 $\frac{3}{4}$  feet of the leather that had been billed as belly centers were in fact bellies. He further found from inspection of claimant's ledgers that the balance of the particular lot had been sold and delivered by claimant.

5. The zone supply office, New York City, by letter of April 7, 1920, recommended to the Surplus Property Division, Washington, D. C., that an allowance of \$0.03 per foot be made on 3,661 $\frac{3}{4}$  feet for the difference in value between belly centers and bellies.

#### DECISION.

1. It is the opinion of this Board that the Government has not complied with the terms of its contract, but to the extent of 3,661 $\frac{3}{4}$  feet has delivered bellies, a material of less value, instead of belly centers as offered and purchased by claimant at the auction sale of September 18, 1919.

2. Claimant had the privilege of refusing to accept the material or of returning it to the Government and thereupon rescind the contract entirely. The claimant did not choose to repudiate the contract altogether, but accepted the property as satisfying the contract in part and now seeks to recover damages for the defect. Claimant has not and can not now offer to rescind because he disposed of the property and now claims damages for breach of the contract by the Government.

3. No regulations covering the form of contracts for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

4. It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919.

5. This Board is, therefore, without authority to grant relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.

JUNE 19, 1920.

Case No. 2296.

*In re* CLAIM OF WEST COAST SHIPBUILDING CO.

1. **JURISDICTION.**—Where the claimant entered into a formal contract for the construction of concrete boats, and was required to give a bond for the faithful performance thereof, which it failed to do, and the contract was revoked and canceled because of such failure, this Board has no jurisdiction because the contract was terminated by breach of the claimant.
2. **IDEM.**—In such case, if, as claimed, the Government waived the requirements of the performance bond, and afterwards revoked and canceled the contract, this Board has no jurisdiction because the contract was terminated by breach on the part of the Government.
3. **CLAIM AND DECISION.**—Claim under General Order 103 on formal contract for \$263,302.18 on concrete river boat contract. Held, no jurisdiction.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$263,302.18, under the following circumstances:
2. The claimant is a corporation organized under the laws of the State of Washington. It was requested to present a bid for the construction of 18 concrete river steamers and some barges. The request for bids required that each bidder should furnish what was called a bid bond, and it was required that in case the bidder was successful a bond should be furnished guaranteeing the performance of the contracts that should be awarded.
3. The claimant's bid of \$132,577 for each of 14 concrete river boats was accepted by the Government. Formal contracts dated June 29, 1918, were prepared and executed by the Government and by the claimant, calling for the construction of seven boats on the Pacific coast and seven on the Atlantic coast.
4. The claimant secured a yard in the city of Everett, Wash., on the Puget Sound water front. It intended to drive piles in the shallower water near the shore and construct the vessels on ways to be built on a foundation of piling. It expected assistance from the citizens and the municipality of Everett and had counted on obtaining

the necessary bond from the Globe Indemnity Co., of New York. The financial resources of the officers and promoters of the claimant corporation were limited. There was difficulty in obtaining a bond.

5. The construction of the river steamers was in the hands of the Transportation Service of the War Department. The Shipping Board was utilizing the resources of substantially all the established shipyards of the country in the construction of steel vessels. The Government requirements for all available labor for use in the construction of steel vessels as well as its requirements for steel resulted during July and August, 1918, in friction between the Shipping Board and the officers of the Government who were handling the construction of the concrete river steamers. The claimant in August, 1918, was requested to suspend work on its contracts. Later on it was directed to proceed with the performance of its contracts.

6. The evidence in the case is voluminous, the exhibits numerous, and the testimony of the claimant's witnesses is not altogether in accord with that of the officers of the United States. The requirement for a bond was fixed first at 50 per cent of the contract price. The Government later reduced the amount of the bond required to 33½ per cent of the contract price. On October 31, 1918, Gen. George W. Goethals, Chief of the Purchase, Storage and Traffic Division, sent the claimant the following letter:

"1. In connection with the award to your company on June 29, 1918, for the construction of 14 reinforced concrete river steamers, in accordance with bids submitted by you under date of June 25, 1918, which award you were formally notified of by letter from this office dated July 1, 1918, you are hereby informed that the award for the construction of these vessels by the West Coast Shipbuilding Co. is hereby revoked.

"2. You are also informed that since you have not entered into contract for the construction of the above boats as agreed, the bond submitted with your bid is hereby declared forfeited.

"3. The provisions upon which the above action is based are included in the circular proposal and specifications for the construction and complete equipment of 130-foot steel and reinforced concrete river steamers, which were furnished you and are as follows: 'That if the proposals be accepted within 60 days from date of opening of bids, bidder will within 10 days after notification of acceptance enter into formal contract and give bond with good and sufficient sureties for the faithful performance of the same.'

"GEO. W. GOETHALS,  
"Major General, Assistant Chief of Staff,  
"Director of Purchase, Storage and Traffic."

#### DECISION.

1. The quoted letter from Gen. Goethals was intended to be and is a cancellation of the claimant's contracts. If the Government had a right to cancel the contracts because of the failure of the claimant

to furnish bond, there is no obligation on the part of the United States. If the requirement for a bond was waived by the Government, and there is some evidence in the record which would warrant such a finding, then the Government had no right to cancel the contracts and is liable to the claimant for a breach. In either event no relief can be given the claimant by this Board. When the Government has committed such a breach of a formal contract as to terminate it the rights and obligations of the parties must be determined in the courts. It is only in cases where the performance of formal contracts is suspended that this Board has any power to make any determination as to the rights and obligations of the parties. For similar reasons, if the claimant has itself committed a breach of a contract by its failure to furnish a bond, and the Government elects to consider such breach a termination of the contract, no supplementary contract calling for a payment to the claimant can be entered into, and this Board is precluded from making any determination of the issues involved in the case.

2. For the reasons stated we must hold that this Board is without jurisdiction to pass on the complicated issues which have been presented. The remedy for the claimant, if remedy it has, is in the courts of the United States.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.  
Col. Delafield concurring.

JUNE 19, 1920.

**Case No. 514.**

*In re* **CLAIM OF SEARS, ROEBUCK & CO.**

1. **EXPERIMENTAL COSTS.**—Where claimant heard indirectly of the Government's needs of certain articles and undertook experiments of its own accord without any order from the Government or any promise to pay experimental costs but expecting to receive future contracts, there is no implied agreement whereby the Government is obligated to reimburse claimant such costs.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$1,083.78, based upon an alleged oral or implied agreement in relation to experimental work in developing machine-gun accessories.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Class A, has been filed under Purchase, Storage and Traffic Supply Circular No. 17 with the Chicago district ordnance claims board which has referred the claim to this Board for an opinion as to the existence of an agreement between claimant and an officer or agent acting under the authority of the Secretary of War.

**STATEMENT OF FACTS.**

1. In June, 1918, claimant was maintaining as a part of its permanent business establishment a department of research, and at the same time the Ordnance Department was interested in the development of an improved type of cartridge belt or container for the Browning machine gun. This fact came indirectly to claimant's notice.

2. On June 26, 1918, claimant wrote to the War Department stating that this matter had been brought to its attention by one of its own employees and that it would be very glad to give its immediate attention and very best endeavors to this problem if the department would be so gracious as to furnish it with additional information. This communication is the first transaction between the parties appearing in the record and seems to have been the starting point for what followed. This letter was answered July 2, 1918, by Maj. J. S. Hatcher, Ordnance Department, who stated that he had been instructed by the Acting Chief of Ordnance to give the information



requested, and added, "If you are still interested this department will be glad to furnish further detail information.

3. The next step is a letter of August 2, 1918, from claimant to Maj. Hatcher, attention of Capt. Burdett, in which the writer states:

"I propose to take advantage of the opportunity presented by your letter and personally inspect the samples of your work showing the progress you have made toward a solution of this problem. I shall be glad to be at your disposal the latter part of next week at which time I will submit the various models developed by this department for your inspection and criticism."

4. On October 24, 1918, Maj., then Lieut. Col., Hatcher wrote to claimant asking for information as to what progress had been made on each of the several projects "you have in development," stating that his office desired to get some action on these matters as soon as possible.

5. On November 1, 1918, Col. Hatcher wrote again to claimant inclosing two photostats of a proposed type of ammunition box bracket and a proposed type of ammunition box, and stating:

"It is believed that these photostats will give you sufficient detail regarding important dimensions so as to enable you to make up a sample box along your own ideas."

6. On November 5, 1918, Col. Hatcher wrote claimant in regard to certain drawings of a belt-loading machine and a machine-gun mount, stating:

"Both of these articles as designed by you appeared to possess features of special merit and working models of these two articles would be very useful to this section in determining whether or not further action should be taken toward production of such material for use by the United States Army.

"If you will kindly inform this office of the expense of manufacturing working models as outlined above, the proper steps can be taken in this office to request the placing of a contract with you for such experimental work on behalf of the Engineering Division, Ordnance Department. In any event, it is desired that these working models be produced at your earliest convenience."

7. November 26, 1918, Col. Hatcher again wrote claimant stating:

"It is now expected that there will be some difficulty in getting experimental orders placed. This office, therefore, desires to get this matter in the proper form so that action can be taken to get these orders properly passed through the military channels. Any information you can give as to the status of this experimental work will be appreciated in this office."

8. It appears that on October 3, 1918, while the foregoing correspondence was going on, there was issued to claimant by the Ordnance Department a procurement order covering 1,000 wooden expendable machine-gun ammunition boxes, "these boxes to be made

in accordance with sample submitted by Dr. Dun Lany, of the research department (of Sears, Roebuck & Co.), to Capt. Peoples, of the Engineering Division of the Ordnance Office, on September 7, 1918." Apparently, however, this order was never followed by any contract and there is no evidence that claimant ever undertook the manufacture of these 1,000 boxes.

9. Claimant is asking for part of the expense to which it went in doing this experimental work, which seems to have led up to the issuance of the procurement order above cited. It does not appear that any part of the claim is based on the procurement order itself.

10. This claim was originally filed as a class A claim, based on the foregoing correspondence. Subsequently in a letter to this Board dated August 20, 1919, claimant stated:

"Our agreement with the Machine Gun Small Arms Section, Engineering Division, Ordnance Department, *was entirely verbal* with the exception of an order for 1,000 ammunition boxes and later to another for 50,000 ammunition boxes, which was canceled after the signing of the armistice. *Terms of the agreement, although not set forth in written form, contemplated the placing with us of orders for large quantities of the various articles which our preliminary work perfected.*"

In view of this statement claimant was asked to furnish oral or written testimony in support of this alleged verbal agreement. Claimant has not complied with this request, but has indicated its willingness that the claim be disposed of on the record as it stands.

#### DECISION.

1. From the evidence contained in this record it appears that claimant did certain preliminary experimental work upon various types of articles needed by the Ordnance Department and furnished models to the Ordnance Department; that the work and the models furnished were satisfactory, were accepted, and the Ordnance Department went so far as to take steps to give claimant a contract for some of these articles in accordance with its samples.

2. In the absence of anything to the contrary, it might be said that these facts raise a presumption of an implied agreement on the part of the Government to reimburse claimant for the expense of this preliminary work. The record, however, seems to furnish evidence sufficient to rebut this presumption.

3. In the first place, there is no evidence that the necessity for the work was called to claimant's attention by the Government or any request made by any Government representative to claimant to undertake the work or any promise made to pay for it, but rather it appears clearly that claimant heard indirectly of the Govern-

ment's needs and, that the experiments were initiated by claimant itself, who, as far as the evidence shows, never asked to be paid for it. It is true that Col. Hatcher inquired the cost of making the models and asked that they be made, but this request alone is not sufficient to show any intention to pay for all the experimentation. Secondly, it will be noticed that the statement of claim describes the work as "preliminary," and the correspondence in support of the claim has the appearance of a discussion of something that was to lead up to future business transactions, rather than the conduct of such actual transactions themselves. This view is borne out to some extent by claimant's subsequent statement that it is really relying on an oral agreement by which it was to receive contracts based on this preliminary work. In this record, as it stands, however, there is no evidence to support this allegation of an oral agreement.

#### DISPOSITION.

1. Under these circumstances, in view of claimant's failure to supplement the record with further evidence, its case is not made out and the claim should be denied.

Col. Delafield and Mr. Patterson concurring.

JUNE 19, 1920.

Case No. 2661.

*In re* CLAIM OF BETHLEHEM STEEL CO.

1. **ADJUSTMENT OF PRICE.**—Where the contract provided that the contracting officer might make changes in the contract requirements and that the contract price should be increased, or decreased, in accordance with the cost to the contractor; and changes are made reducing the cost to the contractor, and others that involve additional expenditures and the contractor offers to comply with the latter, if no change is made in the contract price, which offer is accepted; no additional allowance will be made for such extra expenses.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,887.50 expenses for blocking shell for transportation; Held, claimant can not recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$8,278.73, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim was originally filed before the Philadelphia district claims board, Ordnance Department, on June 27, 1919, and awards were made by that board and accepted by claimant which reduced the amount of the claim to \$4,740.78. This amount was made up of two items, as follows:

Hauling and stacking 16,000 crates-----	\$1,853. 28
Lumber for car blocking-----	2, 887. 50
Total -----	4, 740. 78

3. The award as made by the Philadelphia district claims board, Ordnance Department, was accepted by claimant. The Claims Board, Ordnance Department, however, allowed the item for hauling and stacking 16,000 crates, \$1,853.28, but disallowed the item for lumber for car blocking, \$2,887.50. From the disallowance of this latter item by the Claims Board, Ordnance Department, claimant appeals to this Board, and a hearing was held on May 25, 1920.

4. Claimant is a corporation organized and existing under the laws of the State of Pennsylvania.

5. On or about March 1, 1918, claimant entered into a contract, in form but proxy signed, with the Ordnance Department, United States Army, to "completely load and assemble and deliver to the United States" 24,000 10-inch common steel shell, in accordance with the drawings and specifications referred to in "Schedule 1" thereunto attached and made part thereof, and such changes as might be made in said schedule as in said contract provided. The schedule referred to contained the following provision:

"Boxing and packing: In accordance with Ordnance Office drawings, class 76, division 3, drawing No. 9, last revised April 23, 1915."

The drawing referred to is attached to the file.

6. The contract contained the following provision at the end of Article II, page 6:

"The contractor at his own expense shall suitably pack, box, and mark the articles and cars before or after storage."

This contract was numbered War-Ord. G621-364A.

7. It was also provided in Article III, page 8:

"The United States agrees to furnish, without cost to the contractor, the shell body, fuzes, base covers complete, and explosive D, *and boxes for the articles* whenever and wherever the contractor may call for delivery of the same. Such shall remain the property of the United States, and the contractor agrees to use due and proper care in the handling and storing thereof while in its control."

8. The contract also contained the following clause:

"ART. V. It is agreed that the contracting officer may, by written notice to the contractor at any time, make changes in the drawings and specifications or supplemental or substituted drawings and specifications which relate to, form a part of, or are added to this contract. If such changes involve substantial additional expense, a fair addition will be made to the purchase price, but if such changes involve substantially lesser work, or labor, or material, a fair deduction may be made therefrom, all as shall be determined by the contracting officer. No claim for addition or deduction on account of any such change will be made or allowed unless the same has been ordered in writing."

9. By a supplemental contract, dated March 30, 1918, the number of shell to be loaded was reduced to 20,000, but the contract was otherwise left unmodified. This supplemental contract was also proxy signed.

10. Under date of February 12, 1918, the Artillery Ammunition Section, Engineering Bureau, by Maj. L. A. Nickerson, Ordnance Department, National Army, wrote to the Inspection Division a letter relative to the shipment of 10-inch shell, paragraph 5 of which contained the following sentence:

"This shell will not be packed in boxes, but will be shipped with only a grommet for protection of the rotating band."

A copy of this letter was transmitted to claimant by Col. C. C. Jamieson, Ordnance Department National Army, Chief Inspector for United States Army, Redington Plants, by letter dated March 4, 1918, which last mentioned letter contains the following sentence in paragraph 3:

"In this connection we attach herewith a copy of letter from the Engineering Bureau, addressed to the Inspection Division, in regard to loading and shipping these 10-inch shell. Such blocking boxes as will be required, so far as we know, have not been ordered."

11. Most of the shell to be loaded were shipped to claimant at its loading plant and arrived at its loading plant in Newcastle, Del., in crates. These crates were the property of the Government and were removed by claimant and turned over to the Government inspecting officer. The cost of the labor for hauling away and stacking these empty crates, \$1,853.28, has been allowed by the Claims Board, Ordnance Department, and is not in dispute here. The claim in dispute here is for the lumber required for blocking of the loaded shell in the cars.

12. On March 16, the Procurement Division, Ordnance Department, addressed the following letter to claimant company:

"1. I am directed by the Acting Chief of Ordnance to request that you at your earliest convenience submit to us an estimate in accordance with conversation with your Mr. Madden, in regard to reduction in price on the above contract owing to the fact that it is no longer necessary to fuse these shells.

"2. I think it only fair that you should give in this estimate some consideration to the additional risk which the fusing would have involved."

And on March 25 claimant company replied to said letter. The material portion of said reply is contained in paragraph 4 of said letter, as follows:

"4. Additional car blocking: Owing to the fact that the shells are coming to us without boxes and we are instructed to ship them out in the same manner, considerably more blocking is necessary to secure the shells in the cars for transit.

"We find that the above additional operations more than offset the cost of fusing the shells, and we, therefore, feel that we should not be called upon to make a further allowance in the price of these shells. We might state that had we been required to fuze the shells in accordance with the original arrangement, we would have found it necessary to request the department to reimburse us for the additional work which we have been asked to do apart from the boxing of the fuzes, base plates, and other components."

13. Upon receipt of the letter of March 25 the Procurement Division, Ordnance Department, replied as follows under date of March 28:



Subject: War-Ord. G621-364A, covering the loading and assembling of 10-inch high-explosive shells.

1. I am directed by the Acting Chief of Ordnance to acknowledge your letter of March 25, in which you set forth the various additional operations you have been called upon to perform in the loading and assembling under this contract, and which you state more than offset the reduction in cost resulting from not fuzing the shell.

2. Under the circumstances I believe it reasonable to allow the price to remain as in the contract, and consequently the amendment to the contract will simply call for reduction in quantity of 4,000."

13. At the hearing claimant relied largely upon a letter of March 16, which was an interplant letter, and was not called to the attention of the officers of the Government at the time the letter of March 25 and the reply thereto of March 28 was sent and received.

#### DECISION.

1. The contract of March 1, 1918, being a proxy-signed contract, becomes informal, and the claim is therefore properly filed under the act of March 2, 1919.

2. Article V of the written contract herein provides that at any time, upon written notice to the contractor, the contracting officer may make changes in the drawings and specifications or supplemental or substituted drawings and specifications. If such changes involve additional expense, a fair addition will be made to the purchase price, but if such changes involve substantially lesser work or labor or material a fair deduction may be made therefrom. On March 16 the contracting officer wrote claimant company, calling attention to certain changes which reduced the cost to the claimant, and suggested a reduction in the price of shell to the Government as these changes reduced the cost to claimant. In its reply on March 25, claimant company acknowledged this reduction, but called attention to certain other changes which offset the changes on which the contracting officer had requested a reduction of cost, and among other things which claimant called to the attention of the Government officers was additional car blocking, and a statement that these additional operations more than offset the changes on which the Government requested a deduction, and stated:

"We, therefore, feel that we should not be called upon to make a further allowance in the price of these shell."

3. Its letter was in the nature of an offer to the Government to block the shell in the cars, providing the Government allowed the price of shell to remain as they were, and the Government, in its letter of March 28, accepted the offer of claimant. It is also clear from the record that at the time that claimant wrote the letter of March



25 it was in possession of its interplant letter and that additional material for blocking was required. It did not communicate this fact at that time, but made the offer to the Government, as stated above in its letter of March 25, which was, on March 28, as above stated, accepted by the Government.

4. In view of all the evidence, this Board is of the opinion that claimant, on March 25, offered to block the shell in the cars in consideration of the Government not demanding a reduction in the price of the shell, and that this offer was accepted by the Government on March 28. The claimant company has been paid the contract price for its shell, and in the opinion of this Board is not entitled to any additional compensation for the additional blocking required.

5. The item for the hauling and stacking of the crates having been allowed, it is not in question before this Board.

6. Relief, therefore, on the item in dispute herein must be denied.

#### DISPOSITION.

1. A final order denying relief on this item will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 19, 1920.

Case No. 2021.

*In re* CLAIM OF E. I. DU PONT DE NEMOURS CO.

**1. EXPERIMENTAL COSTS—EXPRESS AND IMPLIED AGREEMENTS.—**

Where the evidence shows an express agreement between the negotiating parties in regard to the cost of experimental work to the effect that the Government representative would recommend the awarding of contracts to claimant if it developed acceptable materials, such express agreement precludes any implied agreement as to reimbursement of such costs. Accordingly, since contracts were recommended in pursuance of the express agreement, and two contracts actually awarded, there is no merit in a claim for the unabsorbed experimental costs based upon an alleged implied agreement to reimburse claimant for all its experimental costs.

**2. CLAIM AND DECISION.—**Claim under the act of March 2, 1919, for \$19,303.38, based upon an implied agreement in relation to the cost of experimental work in connection with fabric for protection from poison gases. Held, claimant is not entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Supply Circular No. 17, and the claim was originally presented to the Philadelphia District Claims Board, Chemical Warfare Service, from which it has been transferred to this Board as a Class B claim.

The claim is for the value of certain experimental work in connection with fabrics for protection from poison gases, and is based upon an alleged implied agreement with a representative of the Secretary of War.

STATEMENT OF FACTS.

In the latter part of 1917 and the early part of 1918 claimant, through Mr. K. K. V. Casey, assistant to its vice president, had a number of conferences at claimant's office in Wilmington, Del., with Dr. W. K. Lewis, originally assistant in charge of gas defense problems of the War Gas Division of the Bureau of Mines, Interior Department, and later transferred with other personnel to the Gas Defense Branch of the Chemical Warfare Service of the War Department. Throughout the transactions involved in this case, Dr. Lewis appears to have been an authorized representative of the Secretary of War as respected the experimental work on which the claim is based.

These conferences were initiated by Dr. Lewis for the purpose of obtaining from claimant its cooperation in the development of a suitable material for impregnating fabrics in such a way as to make them proof against poison gases. The needs of the War Department for such material at this time were pressing, and the department was obliged to appeal to manufacturers for assistance in experiments looking toward the production of the substances required because these particular branches of the Interior and War Departments at this time were not equipped either with laboratory facilities or available appropriations for the prompt conduct of necessary experimentation.

Under these circumstances Dr. Lewis appealed to claimant for assistance, asking that it give him the same cooperation which had been afforded him by other manufacturers in connection with gas-defense materials of other kinds. Claimant for a long time before the war had been in the habit of supplying its laboratory facilities to the Government for experimental work in connection with contemplated Government contracts for war material in accordance with a practice by which it was allotted a proportion of the resulting quantity production at prices sufficient to reimburse it for such experimentation. With the coming of the war, however, this experimental work conducted for the Government reached such large proportions that claimant felt justified in requesting compensation for the experimentation as such. As a result of this, Mr. Casey took up with Dr. Lewis the question of claimant's compensation for the experimental work involved in this case. Dr. Lewis pointed out to him that he had no funds at the time to pay for the work and no authority to authorize or promise any contracts for production of material, but he told Mr. Casey that if claimant would develop a fabric satisfactory to him, he would recommend its adoption to his superior officers in a position to take steps looking to the issuance of production contracts to claimant, and that in case his recommendations were not successful he would do what he could to see that claimant received compensation in some other way. In view of the recognized needs of the Government, the necessity for haste and consequent avoidance of all possible accounting technicalities, and the confidence felt on both sides that because of the large requirements of the Government for these materials Dr. Lewis's recommendations would result in the granting to claimant of contracts of sufficient size and at adequate prices to enable it to absorb the expense of the contemplated experimentation, and that the necessary appropriations would eventually be made, Mr. Casey expressed willingness on behalf of claimant to undertake the experimental work at claimant's expense on the basis outlined by Dr. Lewis.

Claimant conducted the experiments and produced a fabric suitable to Dr. Lewis who recommended its adoption and use. As a result of his recommendation, claimant received through its subsidiary, The Du Pont Fabrikoid Co., two contracts for various types of the fabric in question. These contracts were sufficient to absorb a certain proportion of the experimental expense. Owing to the intervention of the armistice, no further contracts were received, and claimant had no opportunity to absorb the balance of the experimentation costs through further contracts. Claimant thereupon appealed to Dr. Lewis for assistance in obtaining reimbursement for this unabsorbed portion of its expenses, and Dr. Lewis appears to have done what he could by letter and personal solicitation among his department superiors to obtain some reimbursement for claimant, but without success.

Claimant asks for the amount of this unabsorbed portion of its experimental expenses on the theory that the transactions between Mr. Casey and Dr. Lewis in the light of the circumstances under which they took place, and claimant's action on the faith thereof, gave rise to an implied agreement to pay claimant the reasonable value of its services in conducting such experimental work, the best evidence of such value being what the work actually cost. The evidence as to oral conversations is supplemented by written correspondence, but reliance is placed on what occurred at personal interviews between Dr. Lewis and Mr. Casey.

#### DECISION.

It is not possible from the evidence in this case to establish any state of facts from which the implied agreement that claimant sets up can be derived. The evidence is clearly to the effect that Dr. Lewis and Mr. Casey discussed the question of compensation with a view to reaching an agreement on the subject, and did arrive at an understanding affording a satisfactory basis for proceeding with the work. Whatever agreement is to be found in the evidence, therefore, is express and precludes the idea of an agreement arising by implication in the absence of any definite understanding.

The express agreement in relation to claimant's services so reached was that claimant should do the experimental work, and if it resulted in the production of an article that would meet with Dr. Lewis's approval, he would recommend the adoption of such article to the branch of the service charged with the issuance of production contracts, with which he personally had nothing to do, and that if such recommendation did not result in the issuance of contracts, he would do what he could personally to obtain reimbursement for claimant in some other way. The evidence shows that this agreement

was made, and also that it expresses the entire understanding arrived at.

Dr. Lewis was not in a position to promise any actual production contract or to secure claimant cash reimbursement for experimental work, and there is no evidence that he made any such promises or that he undertook to give any assurance beyond a recommendation of the suitability of the fabric. Claimant apparently understood the limits of his authority and intentions and appreciated the business risk involved; and although claimant evidently desired and intended to secure reimbursement in some form at some future time, it is clear that claimant decided and agreed to rely therefor on the opportunity for reimbursement to be afforded by the anticipated production contracts which its own business judgment led it to believe were certain to develop in view of Dr. Lewis's undertaking to recommend its product for embodiment in such contracts and, in the last resort, on Dr. Lewis's willingness to do what he personally could to secure eventual appropriations to take care of the situation. There is no evidence that what claimant did was based on any act or promise on the part of the Government beyond the above.

The evidence is equally clear that the Government has carried out the agreement which Dr. Lewis made. The claimant's product being satisfactory to him, he did recommend its adoption, and it was adopted, and contracts were issued to claimant to the extent required by the undertaking of Dr. Lewis. No specific contract was ever promised to claimant. That the contracts actually issued were not sufficient in number or size to fully reimburse claimant is, therefore, not attributable to default on the part of the Government in any obligation which it had assumed. Also, after the armistice, when further contracts were not forthcoming, Dr. Lewis, in accordance with his further assurance to claimant, did what he personally could to secure claimant against loss, and appears to have fully carried out any obligation that may have rested on the Government in that respect.

Under these circumstances the Government has fully met whatever obligation it may have assumed in connection with this experimental work. There seems to be no basis from which there can be implied any obligation beyond that which the Government has already performed in its entirety.

#### DISPOSITION.

An order denying relief will be entered.

Col. Delafield and Mr. Hope concurring.

JUNE 19, 1920.

**Case No. 2751.**

*In re* **CLAIM OF STONE & WEBSTER.**

- 1. CONSTRUCTION OF WRITTEN CONTRACT—INSURANCE PREMIUM.—**Under a cost-plus contract providing for reimbursement of the contractor for the cost of "Such bonds, fire, liability, and other insurance as the contracting officer may approve or require," the refusal of the contracting officer to allow the cost of public liability insurance was a proper exercise of discretion, and the Government is not obligated to reimburse the contractor for premiums paid on such insurance.
- 2. CLAIM AND DECISION.—**Claim for \$8,113.72, presented in accordance with General Order 103, based upon a validly executed contract for the construction of a cantonment (Camp Travis). Held, claimant is not entitled to recover.

Mr. Williams writing the opinion of the Board.

**FINDINGS OF FACT.**

This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$8,113.72 under the following circumstances:

1. Under date of June 20, 1917, the Government of the United States (by Maj. W. A. Dempsey, quartermaster, United States Reserves, contracting officer) entered into a contract with Charles A. Stone, Edwin S. Webster, Russell Robb, Henry G. Bradlee, Dwight P. Robinson, and John W. Hallowell, partners doing business under the firm name of Stone & Webster, by which Stone & Webster undertook and agreed to construct, upon what is commonly called a cost-plus basis, a cantonment for an infantry division at Fort Sam Houston, Tex. This contract contained, among many others, the following statement of expenditures for which petitioner should be reimbursed:

ART. II. \* \* \* (h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any

of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

2. At the time of entering into this contract petitioner, as was its usual custom, secured a policy of insurance against accidents to the public. Shortly after the work was started a discussion arose between petitioner and the representative of the contracting officer at the site of the work as to whether the Government would make reimbursement for premium upon a public liability bond, and this matter was later taken up by correspondence with Gen. I. W. Littell, United States Army, who was in charge of the construction division of the Quartermaster Corps. As the correspondence constitutes practically all of the facts in the case, it is deemed essential that it should be set out in some length, as follows:

(a) Letter from petitioner of July 13, 1917, to Gen. I. W. Littell, containing the following statement:

"We think we should also be authorized to protect ourselves against accident claims from the public by taking out public liability insurance, and, for your information, would advise that we have a rate of 31 cents per \$100 pay roll covering us for \$15,000 for any one person and \$20,000 for any one accident, and these are the limits that we use in connection with all public liability insurance we have at the present time on other Texas work."

(b) Gen. Littell replied by letter of July 15, 1917, containing the following statement:

"4. The Government has decided that contractors will not be authorized to take out public liability insurance policies."

(c) Petitioner responded on July 25 by a letter containing the following statement:

"In view of your decision that contractors will not be authorized to take out public liability insurance policies, we wish to go on record that such a risk exists in connection with our contract (though probably a small risk), and that you should change these instructions or assure us that any claims from the public in connection with accidents are a proper charge to the contract."

(d) The above letter was handed to Gen. Littell in Washington, and on the same day, July 25, he responded as follows:

"3. Your attention is directed to the fact that clause H of Article II provides for your reimbursement for any losses which 'have clearly resulted from causes other than the fault or neglect of the contractor,' and the terms of the contract will be adhered to."

(e) Petitioner responded under date of July 28, 1917, as follows:

"With further reference to our letter to you of July 25 and your reply of like date regarding insurance, would call your further attention to the matter of allowing us to carry public liability insurance on cantonment work."



"By referring to the contract, Article II, section 4, second paragraph, which states that—'such losses and expenses not compensated by insurance, or otherwise as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work and to have clearly resulted from causes other than the fault or neglect of the contractor,' are to be construed as part of the cost of the work, and this phase of the contract judging from a theoretical standpoint covers the matter satisfactorily. We feel, however, that the practical working out of this arrangement will not be satisfactory to either your office or the contractors.

"It is unquestionably a business requirement that we protect ourselves against that class of accidental emergencies which might be construed as fault or neglect on our part even though judgments obtained for that class of accidents as were not clearly the result of fault or neglect on our part are to be considered part of the cost of the work. Cantonment building being emergency work, the element of danger due to haste is ever present and unthinkingly safety might easily be sacrificed for speed even though we take every precaution humanly possible to guard against such accidental emergencies.

"The local conditions in and around San Antonio are particularly bad for the defense and settlement of accident cases. Lawyers deficient in the ethics of their profession are not hard to obtain and witnesses of unbiased opinion are almost an impossibility.

"Suits by the public will be brought against us and a claim department will undoubtedly have to be established in charge of an experienced man familiar with local laws and practice to investigate all public accidents and determine whether claims are just or false. We do not know whether the contracting officer would have to duplicate this organization or not, but would assume that he would in order to make his independent investigations. It has been our experience that public claims over which there is more or less litigation have resulted in delays in the courts, long drawn out negotiations, and the impossibility of knowing the final cost of a good many claims for a long period after the construction operations are completed. In cases which involve litigation the matter of lawyers' fees is a considerable item. If we are allowed to carry public liability insurance, all of this detail is taken off our hands by the insurance company, and our only obligation is to report the accidents as they occur. This can be easily done by the force now organized to report accidents to employees. All the above service except reporting accidents can be obtained at a definite cost, and as soon as the pay roll stops the premium ceases to accrue and a final cost can be obtained at once and the accounts will not have to be opened after the work is completed. All controversies as to whether the accidents clearly resulted from causes other than the fault or neglect of the contractor would be eliminated and the contracting officer relieved of considerable detail and responsibility that otherwise would fall upon him.

"There are a great number of possibilities for accidents to the public which are difficult to avoid on work of this nature. We refer particularly to accidents to sightseers, tradesmen or their representatives, and persons in public busses injured while riding to certain

points on the job where their business may or may not legitimately call them, accidents to the public caused by Army trucks, and also the possibility of accidents to enlisted men who may be quartered at the camp before its completion.

"We feel that by carrying public liability insurance at a definite cost a saving would result to the Government, and as we have been allowed on other Government work to carry this form of insurance even where the public hazard is not as great as cantonment construction, we feel that the premium on this insurance should be considered a part of the cost of the work.

"The public liability insurance policy which we propose placing will be written by the Ocean Accident & Guaranty Corporation (Ltd.), and carries limits of \$15,000 to any one person and \$20,000 for any one accident. This insurance includes all costs and interest accruing upon judgments rendered against us and includes the expenses for investigation, negotiations, and defense, and also provides such medical relief as is imperative at the time of the accident. The policy will be written at a rate of \$0.30½ per \$100 of pay roll, and we feel that it is a necessary expense toward the proper prosecution of the cantonment work.

"In consideration of the foregoing facts, we would again ask that we be allowed to carry a public liability policy. Please advise us as to your decision."

(f) The Government responded under date of July 31, 1917, as follows:

"1. Acknowledgment is made of your letter of July 28, and in reply thereto you are advised that this division is still of the opinion that the premiums for public liability insurance are not a proper cost within the meaning of the contract. If accidents to the public occur not as a result of your fault or neglect, the Government will reimburse you for any losses and expenses incurred in accordance with the terms of the contract. If judgments are obtained against you for accidents arising through your fault or neglect, you must be prepared to pay such judgment. If you should deem it advisable to protect yourself against such contingencies by taking out public liability insurance, that is a matter with which the Government is not concerned, and the premiums thereon are not to be included among the reimbursement items.

"Your statement that the public liability insurance would have the advantage of permitting the total cost to be known when the construction work is completed does not harmonize with our understanding of this form of contract; as usually written it provides for \$5,000-\$10,000 limits, which mean that for an accident to one person the liability of the company is limited to \$5,000, and the carrier's liability is limited to \$10,000, no matter how many people are injured. If, therefore, one person should be injured and recovers, say, \$7,500, the carrier will be liable only for \$5,000, and the contractor would have to pay the remaining \$2,500. In this case the final cost would not be known until the litigation was decided, which might take years. Your point, therefore, that public liability insurance would obviate this condition does not seem sound to this division.

"3. The point that you raise in regard to accidents to the public caused by Army trucks and accidents to enlisted men is not quite

clear to this office. If the accident were caused by an Army truck, how could the contractor be held responsible? In the same way, it is not clear how an accident to an enlisted man interests the contractor in any way.

"4. We note that in other Government work you have been permitted to carry public liability insurance, but your attention is directed to the fact that the other Government work has not been performed under contracts similar to the one under which you are now working, and your reference, therefore, is not pertinent.

"5. For the reasons stated in the foregoing, it is the opinion of this division that the premiums on public liability policies should not be allowed as an item of cost for which the contractor will be reimbursed."

(g) Petitioner responded under date of August 7 as follows:

"We beg to acknowledge receipt of your letter of July 31, in which you state that the public liability insurance is not a proper cost within the meaning of the contract, and would state that we do not agree with you in your contention and wish to serve notice at this time that we are carrying public liability insurance with limits of \$15,000 and \$20,000 and shall expect reimbursement under our contract for the cantonment construction covering these premiums.

"We do not feel that we should be called upon to take the certification of the contracting officer as to whether any accident was caused by our fault or neglect, as there is a great possibility of a difference of opinion between us. As the Government can not be sued, suits would be brought against us in every instance, which would mean considerable expense in defense of such suits even if such suits were decided in our favor.

"We advised you in our letter of July 28 that the public policy we were carrying was for \$15,000 for any one person and \$20,000 for any one accident and not for limits of \$5,000 and \$10,000, as is usually carried.

"We would also state that we have been allowed to carry public liability insurance in connection with our work for the Construction Division of the Aviation Section of the Signal Corps, with whom we have a contract along exactly the same lines as the cantonment contract.

"We also have a contract with the Ordnance Department in connection with considerable work for the Rock Island Arsenal; and while the contract is not in exactly the same form as the cantonment contract, we have been allowed to carry a public insurance.

"We would like very much to have you consider your decision and hope you can give us a favorable answer."

3. There was no further correspondence between the Government and petitioner in respect to this matter and no public liability insurance was ever authorized or approved by any Government officer.

4. Gen. Littell testified (Tr., p. 84) that the refusal of the contracting officer to authorize or approve the taking out by the contractor of public liability insurance was the result of a settled policy determined upon by the Construction Division of the Quartermaster Corps at the beginning of cantonment construction work in the sum-

mer of 1917, and this decision was based upon the theory of economy; but that later on, some time in December, 1917, the policy of the Construction Division of the Quartermaster Corps was changed, and thereafter it was determined that contractors would be authorized to take out public liability insurance and charge the premiums to the cost of the work.

5. The construction work called for under the written contract was completed in September or October, 1917, and turned over to the Government. The premiums paid by the petitioner upon the public liability insurance policies taken out, amounting to \$8,113.72, was paid by the petitioner to the Ocean Accident & Guaranty Corporation, an insurance company, and this amount forms the basis of this claim. It does not appear that the insurance company was called upon to make any payments to the contractor for accidents occurring at the site of the work to outsiders.

#### DECISION.

1. Clause (h), Article II, of the contract of June 20, 1917, expressly provided that the Government would reimburse the petitioner for premiums upon—

“Such bonds, fire, liability, and other insurance *as the contracting officer may approve or require*, and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, *and to have clearly resulted from causes other than the fault or neglect of the contractor.*”

2. Under the plain wording of this agreement the Government could not possibly become liable for any accidents to outsiders except those that were not the result of causes other than the fault or neglect of the contractor. It was entirely optional with the Government as to whether it would assume the risk of any such liability, or whether it would protect itself by securing, and paying premiums upon, a policy of insurance to guarantee against such loss, or any portion of it. The evidence clearly shows that the contracting officer, in pursuance of a settled and determined policy in respect to this matter, decided to assume any risk that the Government might be under by virtue of the contract rather than to pay out premiums upon policies to cover such loss; in other words, the Government decided to carry its own insurance against any losses which it might be compelled to sustain as a result of injuries to outsiders not resulting from the fault or neglect of the contractor. Petitioner was fully informed of this at the start and took out the policy at its own risk;

in fact, when the policy of the Government was more fully and definitely explained in the correspondence, petitioner admits that it could at any time have canceled the policy of liability insurance. The policy of insurance actually taken out by the petitioner, and for which the \$8,113,72 premium was paid, was not limited to insuring petitioner against accidents to outsiders resulting from causes other than the fault or neglect of the contractor, but insured the petitioner against "loss by reason of the liability imposed by law upon the assured for damages," which included losses by accident resulting from acts due to the fault or neglect of the contractor, which was an insurance against a great deal higher risk than the Government of the United States and assumed to make reimbursement for as a part of the cost of the work; and it was a perfectly proper exercise of discretion upon the part of the contracting officer to decide that the Government would run its own risk as to the liability which it had assumed under the contract rather than to pay premiums for insurance against such losses. The wisdom of this policy is borne out by the fact that no loss of the character assumed by the Government in the contract of June 20, 1917, was ever sustained at the site of the work.

3. For the reasons above stated, all relief asked for in this case must be denied.

#### DISPOSITION.

An order denying relief will be issued by this Board.  
Col. Delafield and Maj. Farr concurring.

JUNE 19, 1920.

Case No. 2400.

*In re* CLAIM OF STANDARD GAS ENGINE CO.

1. **SUBCONTRACTOR—ASSURANCE OF PROTECTION.**—Where a subcontractor, under a formal contract, was urged to continue production and assured that it would be protected from loss by the Government if prime contractor failed to perform its agreement, no agreement arose between claimant and the Government, for all that was meant was that in the event of any adjustment of the prime contract suitable measures would be taken to protect the interests of the subcontractor.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$4,621.81 loss on gas engines. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$4,621.81, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant is a corporation located at Oakland, Calif. It entered into contracts with the West Coast Shipbuilding Co. to furnish it engines to be placed in river steamers for the construction of 14 of which the West Coast Shipbuilding Co. had entered into formal contracts with the United States.

3. One of the requirements in the request for bids for the construction of the steamers was that the successful bidder should furnish a bond to protect the United States against loss and to insure faithful performance of contracts. The West Coast Shipbuilding Co. ordered engines from claimant company after the contract had been awarded, but before it was able to furnish the required bond. In fact, it was never able to furnish a bond and its contracts were canceled by the United States on October 31, 1918.

4. The claimant company proceeded with the manufacture of engines under its contracts with the West Coast Shipbuilding Co. In the summer of 1918 it received information that led it to doubt the ability of the West Coast Shipbuilding Co. to secure a bond for the performance of its contracts. One of its representatives talked many



times with Maj. Frank Van Vleck, of the Transportation Service, and, it is alleged, received assurance that the claimant would be protected from loss in any event, even if the West Coast Shipbuilding Co. was not able to perform its contracts, and the claimant was repeatedly urged to continue the construction of engines.

#### DECISION.

1. The claimant company is a subcontractor of the West Coast Shipbuilding Co., which had formal contracts with the United States dated June 29, 1918. An assurance by an officer of the United States that the claimant would be protected if it continued performance of its subcontract, even if it be assumed that such assurance were given, does not amount to a new agreement between the claimant and the United States. At the most it is no more than a statement of the established practice of the Government to respect and protect as far as is legally possible the rights of subcontractors who are assisting in the performance of Government contracts. Before any adjustment should be made with the West Coast Shipbuilding Co. it would have been the duty of the Government to take suitable measures for the protection of the interests of the claimant and other subcontractors.

2. We have held in the matter of the claim of the West Coast Shipbuilding Co. that the right of cancellation by the United States of its contract with the West Coast Shipbuilding Co. depends upon the determination of the question as to whether or not the requirement of a bond from the contractor was waived by the United

3. If the West Coast Shipbuilding Co. should bring a suit in the courts of the United States and should be successful, one of the United States. This issue is one for the courts to determine.

3. If the West Coast Shipbuilding Co. should bring a suit in the courts of the United States and should be successful, one of the elements of damages would be the amount owed by it to the claimant company.

If directions to continue the manufacture of engines for the West Coast Shipbuilding Co. were given by officers of the United States, or assurances of the sort alleged, such directions or assurances might be held to be evidence of importance that the Government had waived the requirement that the West Coast Shipbuilding Co. should furnish a bond to insure performance of its contract.

4. The evidence does not warrant a finding that any express or implied agreement was entered into between the United States and the claimant company.

#### DISPOSITION.

A final order will be entered denying the claimant relief.  
Col. Delafield concurring.



JUNE 21, 1920.

**Case No. 341.**

*In re* **CLAIM OF THE SPECIALTY KNIT GOODS MANUFACTURING CO. (RE-HEARING).**

1. **RESTRICTION UPON USE OF MATERIALS.**—Where claimant had a contract with the Government to use certain yarn exclusively for the manufacture of fabric for its prime contractor, held, that after completion of the prime contract claimant was still bound under its direct agreement with the Government to obtain the consent of the Government before disposing of its excess yarn, and that consequently there is no implied obligation binding the Government to compensate claimant for loss suffered on account of the Government's delay in giving such consent, where such withholding of consent was not unreasonable.
2. **CLAIM AND DECISION.**—By its decisions of February 20, 1920, and June 1, 1920 (on rehearing), this Board held that claimant was entitled to relief under the act of March 2, 1919. The case has been remanded by the War Department Claims Board, however, under its resolution of April 6, 1920, after consideration by the standing committee of that board as on appeal from the Board of Contract Adjustment. Held, pursuant to the decision of the standing committee, claimant is not entitled to relief. For the facts see the prior decisions of this Board (Vol. III, p. 905, and Vol. V, p. 915.)

Mr. Eaton writing the opinion of the Board.

**DECISION.**

1. The facts on which the decision is based are sufficiently stated in the decision of this Board rendered February 20, 1920, and in the opinion of this Board on a rehearing dated June 1, 1920, and the findings of fact contained in the decision of February 20, 1920, and in the opinion of June 1, 1920, and referred to and incorporated as the facts on which the present decision are based.

2. The record shows that this claim arises under the act of March 2, 1919, and was heard before this Board on February 5, 1920, at which witnesses for the claimant and for the Government testified. A decision was rendered on February 20, 1920, in which it was held that the claimant was entitled to relief. On the same date certificate Form C was executed and a document signed setting forth the nature, terms, and conditions of the agreement that it was found had been entered into between the claimant and the United States. The claim was then sent to the Claims Board, Director of Purchase, for action. The claim was returned for reconsideration by the special member of

the War Department Claims Board assigned to Purchase. Another hearing was held on April 24, 1920, at which representatives of the claimant were present, and Mr. George W. Reed representing the Government. This Board, after consideration of the arguments on both sides, rendered an opinion confirming its earlier decision. The claim was then submitted to the standing committee of the War Department Claims Board, pursuant to its resolution of April 6, 1920, which reads as follows:

*"Resolved, That in such cases, where a special member believes that the rights and interests of the United States would not be properly protected by an award or settlement contract made in pursuance of a decision by the Board of Contract Adjustment rendered in such case, such special member may request the Board of Contract Adjustment to reconsider its decision, and, for that purpose, shall transmit the entire file to the Board of Contract Adjustment with a full statement of his objections and the reason therefor, and shall also transmit a copy of such statement and the decision to which objection is made to the recorder of the War Department Claims Board. Upon receipt of such request for reconsideration it shall be the duty of the Board of Contract Adjustment to reexamine the case, with special reference to objections raised by the special member, and thereafter to return the case to the bureau board represented by the special member with such modification of its decision, if any, or such comment thereon, as it may deem proper. In case the special member, after careful consideration, shall still be unable to agree with the Board of Contract Adjustment, he may in his discretion submit the whole case to the standing committee, which shall review the entire proceedings as on appeal, and the decision of the standing committee shall be conclusive, except that the standing committee may, in its discretion, submit any such case to the special advisers of the Secretary of War, appointed to hear appeals by claimants, and in such event the advisers will present their recommendations to the Secretary of War as in other cases."*

General Order 40, of March 19, 1919, provides in part:

"3. The War Department Claims Board constituted by War Department Circular 36, dated January 20, 1919, is authorized and directed to exercise, and is hereby designated and established as the agency through which shall be exercised, in the name of the Secretary of War and by his authority, *all powers and duties conferred upon the Secretary of War* by the act of Congress entitled 'An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes,' approved March 2, 1919." \* \* \*

"For the expeditious performance of its duties the War Department Claims Board is authorized to make such use as it may find desirable of the Board of Contract Adjustment, the War Department Board of Appraisers, and any other agency or agencies of the War Department."

Pursuant to the above order, Supply Circular No. 17, Purchase, Storage and Traffic Division, 1919, was passed, and by it the War Department Claims Board, pursuant to its authority under General

Order 40, conferred upon the Board of Contract Adjustment, by paragraphs 5 and 7 of Supply Circular No. 17, certain original and appellate jurisdiction.

The resolution of April 6, 1920, above quoted, was passed by the War Department Claims Board, pursuant to the powers so conferred upon it by General Order 40, and is conclusive upon this Board and the whole War Department, except the Secretary of War and those whom he may designate in such cases to advise or assist him.

3. The standing committee has reviewed the entire proceedings as on appeal from the Board of Contract Adjustment. The standing committee has decided that no ground of liability is established and this Board is directed, by memorandum dated June 12, 1920, that the claimant be denied relief. It is understood that the grounds for denial of relief are that the terms of the contract of May 16, 1918, signed by the claimant company, are inconsistent with the use of the wool allotted that company for any other purposes than in fulfillment of the contract referred to without the consent of the United States, and such consent was not unreasonably withheld.

4. Pursuant to the directions of the standing committee of the War Department Claims Board and in accordance with its memorandum dated June 12, 1920, a final order will be entered denying the claimant relief.

Col. Delafield concurring.

JUNE 22, 1920.

**Case No. 726.**

*In re* **CLAIM OF COLLIER MANUFACTURING CO.**

- 1. CONDITIONAL AGREEMENT TO RECOMMEND PURCHASE.**—Where claimant was unable to meet the requirements of its Government contracts, which were accordingly canceled by agreement, and thereafter, at claimant's solicitations, a Government representative offered to recommend the reinspection of rejected articles upon certain conditions, and also the purchase of the articles, if on inspection the rejections did not exceed 3 per cent, held that since this offer was not accepted prior to November 12, 1918, there was no agreement within the meaning of the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$49,518.37, based upon an alleged written agreement relating to undershirts. Held, claimant is not entitled to relief.

Mr. Averill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$49,518.37 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. This claim is filed in the name of the Collier Manufacturing Co., of Barnesville, Ga. The petition was filed June 28, 1919, and a hearing has been had in the matter.

3. The Quartermaster Corps of the United States Army entered into three "proxy" signed contracts with Clift & Goodrich, 320 Broadway, New York City, for the manufacture of knit undershirts for the United States Army. These contracts were signed by Clift & Goodrich in their own right. It was shown at the hearing that Clift & Goodrich were the selling agents for the Collier Manufacturing Co., of Barnesville, Ga. It appears that the Collier Manufacturing Co. raised no objection to the execution of the contracts by their agents, they fully recognized same, manufactured and delivered under the contracts; Clift & Goodrich received payment for the same and settled with Collier Manufacturing Co.

4. The informal contracts, which were entered into between the Government, acting through H. J. Hirsch, colonel, Quartermaster Corps, and Clift & Goodrich for the manufacture of knit underwear, were as follows:

(a) Contract No. 1164-A, dated March 7, 1918, for the manufacture and delivery of 120,000 summer cotton-ribbed undershirts, delivery to be completed August 31, 1918.

(b) Contract No. 2848-A, dated May 7, 1918, for the manufacture and delivery of 120,000 summer cotton-ribbed undershirts, delivery to be completed October 31, 1918.

(c) Contract No. 3735-A, dated June 11, 1918, for the manufacture and delivery of 120,000 summer cotton-ribbed undershirts, "delivery to be made to this Corps f. o. b. cars Barnesville, Ga., 15,000 undershirts weekly, commencing November 1, 1918."

5. The goods made by the Collier Manufacturing Co. were unsatisfactory to the Government inspectors stationed at the plant, being of tender fabric and unsatisfactory for Army use. Owing to the large number of rejections, the Collier Manufacturing Co. desired to have its contracts canceled, and on or about August 28, 1918, sent the following telegram to Clift & Goodrich, New York, N. Y.:

"On account rigid inspection have stopped knitting Government orders; have fifteen hundred dozen in process, which will be finished. Have written. Unless Government can modify its rigid inspection can not execute any more business. If necessary, will turn over the plant and quit. Inspectors must be withdrawn."

6. Under date of September 5, 1918, the Collier Manufacturing Co. wrote Clift & Goodrich in part as follows:

"Regarding Government contracts, it seems that it (is) impossible for us to please them in our methods of bleaching; so for that reason, as advised last week, we are not knitting any more Government garments, but simply finishing up what is in the works."

7. Manufacture was suspended and inspectors left the plant the first week in September, 1918.

8. Under dates of October 18, October 19, and October 27, 1918, supplemental agreements Nos. 2549, 2548, and 2546, affecting contracts Nos. 1164-A, 3735-A, and 2848-A, respectively, were entered into between Clift & Goodrich and the United States, which supplemental agreements canceled unperformed parts of contracts Nos. 1164-A, 3735-A, and 2848-A.

9. Paragraph 3 of each of the aforementioned supplemental agreements reads as follows:

"That \* \* \* any and all debts, liabilities, claims, or causes of action, if any, existing between the parties hereto, one against the other, by reason of or arising out of the aforementioned modifications of the original contract are hereby released and discharged."

10. Shortly after the suspension of production and on or about the latter part of September, and again later, in the early part of Octo-

ber, 1918, Mr. D. C. Collier, secretary and treasurer, and Mr. J. C. Collier, president of the Collier Manufacturing Co., visited New York and conferred with Maj. F. H. Burgher, chief of the knit-goods branch, Clothing and Equipage Division, New York City, and with Mr. Harry Jacobson, assistant to Maj. Burgher.

11. The evidence shows that the efforts of the representatives of the Collier Manufacturing Co. were directed to obtaining reinspection and acceptance of approximately 27,000 summer-weight undershirts alleged to be firsts, also about 25,000 rejects and seconds, which were on hand at their plant.

12. The claimant alleges that an agreement was entered into between Maj. F. H. Burgher and Mr. Harry Jacobson, on behalf of the Government, and the Collier Manufacturing Co., by the terms of which agreement the Government was to reinspect and accept the goods on hand, and upon this alleged agreement its claim is based.

13. The evidence is clear and convincing that no such agreement was entered into by the representatives of the Government and that no promise was made to the representatives of the Collier Manufacturing Co.

14. The evidence shows that the sample of the goods brought to New York and exhibited to the representatives of the Government clearly demonstrated that the goods on hand were of tender fabric; that they had been injured in the bleaching.

15. The Government did not desire to increase its stock of seconds, and the evidence further shows that the representatives of the Government clearly stated to the representatives of the claimant that they would endeavor to minimize the loss, if possible, by having a further inspection made and then, if the needs of the Government required, recommend that a purchase order be issued for such of the goods on hand as might be serviceable to the Government.

16. The representatives of the Government then took up the question with the authorities in Washington and with the depot quartermaster at Atlanta, and under date of November 4, 1918, the following letter was written by the Clothing and Equipage Division, by Mr. Harry Jacobson, to Messrs. Clift & Goodrich, the agents of the claimant company, 330 Broadway, New York:

"1. Referring to the recent interview with Mr. Collier, sr., and Mr. McKenzie regarding the quantity still on hand of undershirts at the Collier Manufacturing Co.

"2. It will be recalled that this branch stated that we would investigate the matter and find some way by which it would be possible to recommend the stock of approximately 27,000 undershirts for purchase.

"3. We have taken this matter up very thoroughly with our inspection and depot relations branch, who in turn took the matter up with Maj. Frank Walton, in charge of the Atlanta depot.



"4. We are informed by the inspection and depot relations branch to notify you that a recommendation for purchase will be made under the following conditions:

"(a) The Collier Manufacturing Co. to thoroughly and carefully inspect the total quantity of undershirts on hand, and segregating those garments that they consider to be imperfect and of tender fabric.

"(b) Notify this branch as to the quantity then remaining which they offer for purchase, and for which a recommendation to purchase will be made by this branch.

"(c) The Atlanta depot quartermaster will then inspect the quantity purchased and if rejects are found in this lot to exceed 3 per cent of the amount purchased, the entire quantity will be rejected and contract considered as completed.

"5. Will you take this matter up immediately and inform this branch if you will accept the above conditions, to apply against the purchase of the quantity on hand? On receipt of your reply stating the quantity to be purchased this branch will then make the necessary recommendations."

17. To this letter no reply was received until November 18, 1918, when Clift & Goodrich wrote the following letter to the Quartermaster Department, attention Mr. Harry Jacobson:

"We received the following telegram from the Collier Manufacturing Co., of Barnesville, Ga., in reference to the merchandise which they have ready for the Government inspection:

"Accept conditions specified by Government. Merchandise ready for Government inspection. Have inspection instructions wire Maj. Walton."

"Will you kindly have the necessary instructions issued to cover this matter, and oblige?"

18. This letter not having been written until after the armistice, the Clothing and Equipage Division on November 19, 1918, wrote Clift & Goodrich as follows:

"1. Your letter of November 18 quoting telegram received from the Collier Manufacturing Co., accepting conditions relative to the recommendation for purchase of the 27,000 undershirts on hand, received.

"2. This matter has been thoroughly and carefully taken up, and we are obliged to make the following report to you:

"3. On November 4 we wrote you a letter relative to this matter and embodied certain conditions under which a recommendation for purchase would be made, and requested that the matter be taken up immediately, so that the necessary recommendation could be made. A telegram was received by you from the Collier Manufacturing Co. asking if the conditions as set forth in our letter of November 4 could not be made a little easier. You sent this telegram to this office by messenger, and a reply was made to you at that time stating that the matter was no longer in our jurisdiction, and we submitted to you a copy of Maj. Walton's memorandum, dated November 1, to Mr. C. J. Driscoll, supervisor of inspections, and a copy of memorandum from C. J. Driscoll, inspection and depot relations



branch, Clothing and Equipage Division, dated November 2, to this branch showing the reason for our submitting the conditions to you as set forth in our letter of November 4.

"4. Due to the conditions prevailing at the present time, we have been instructed to make no further recommendations for purchase. Since November 4, it is evident that the Collier Manufacturing Co. had ample time to consider the acceptance or rejection of the conditions stated in our letter of November 4, and, inasmuch as no action has been taken by them in making this decision, and under existing conditions, after due consideration, this branch must report it is inadvisable to make a recommendation for this purchase. Had they accepted these conditions prior to the time of our receiving instructions not to make any further purchase, the recommendation would have been made and action taken.

"5. It is our opinion that the Collier Manufacturing Co. are entirely at fault in this matter, because of their neglect in taking immediate action on receipt of information contained in our letter of November 4 to you.

"6. The records at this branch now show that contracts 1164-A, 2848-A, and 1375-A stand as completed.

"By authority of the Director of Purchase."

#### DECISION.

1. Upon the entire record and upon the evidence presented at the hearing, it is the opinion of the Board that no claim can be considered under the original contracts, the same having been terminated by agreement.

2. After a careful consideration of the record and the evidence, it is the opinion of the Board that no agreement, either express or implied, was entered into between the Collier Manufacturing Co. and any officer or agent acting under the authority, direction, or instruction of the Secretary of War or of the President within the purview of the act of March 2, 1919.

3. Relief must therefore be denied.

#### DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.

JUNE 22, 1920.

**Case No. 2660.**

***In re* CLAIM OF WILLIAM B. PERRY, DOING BUSINESS AS W. B. PERRY  
ELECTRIC CO.**

- 1. DELAY IN PERFORMANCE.**—Under a Government contract for certain equipment and installation thereof, providing for payment of damages to the Government in case of delay in performance, the fact that the delay was due to the slowness of subcontractors in manufacturing the equipment does not excuse the contractor from paying damages to the Government.
- 2. JURISDICTION.**—Where a validly executed contract has been fully performed, a claim thereunder can not be determined by the War Department but must be settled by the Treasury Department or the courts.
- 3. CLAIM AND DECISION.**—Claim for \$10,272.48 presented in accordance with General Order 103 arising from a validly executed contract for equipment of an electric pumping station at Fort Bliss, Tex. Held, claimant is not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$10,272.48, plus 6 per cent interest from October 22, 1917, together with "the cost and disbursements of this action" under the following circumstances:

2. On June 21, 1916, the United States entered into a contract with the claimant through Maj. William Elliott, Quartermaster Corps, as contracting officer, by which the claimant agreed to furnish all machinery, material, and labor, and installing, complete and ready for use, an electrically operated pumping equipment for the new pump house then being constructed at Fort Bliss, Tex. Said contract refers to the circular to bidders and specifications which are made part of the said contract. Article IV of the said contract provides that the work shall commence on or before the 27th day of June, 1916, and be completed on or before the 23d day of March, 1917. It also provides:

"ART. VI. That in case of failure of the said contractor to comply with the stipulations of this contract according to the true intent and meaning thereof (including the requirement for progress of performance to the satisfaction of the officer in charge or higher au-

thority), then the party of the first part, or his successor, shall have the right to complete the work in such manner as he shall deem best for the interests of the public service, either by day's labor and open market purchase of the necessary materials or by contract, or both, and to use for that purpose the contractor's materials and appliances on the reservation or at the place where the work is being performed, and any excess of cost resulting from such failure shall be charged to the contractor. In event, however, of the granting of additional time for performance the cost of inspection and other expenses and damages to the United States over what would have been incurred had performance been accomplished by the time originally fixed therefor, if any, except in so far as the same may arise from delays for which the United States is responsible, as determined in each of these particulars by the officer in charge or higher authority, shall be charged to the contractor, and may be deducted from any money due or to become due said contractor from the United States: *Provided*, That where additional time has been granted the United States shall also have the right to cause the remaining part of the contract, or any portion thereof, to be taken from the contractor whenever, in the opinion of the officer in charge, reasonable and satisfactory progress is not being made, and to secure completion at the expense of the contractor, including charges as above on account of delays."

3. The circular and instructions to bidders, dated May 3, 1916, referred to and made part of the contract of June 21, 1916, contained the following provisions:

"4. *Time of performance.*—Bidders for construction proper must state the least number of days, after notification of award of contract in which they will agree to commence the work. Bidders must state in the proposals the time in which they will complete each class of work. Furthermore, it must be understood that, should the contracts be awarded separately, the contractors therefor will be required to commence work at such time as the officer in charge may give notice that the building is ready for same, to carry the work forward in harmony with the construction proper, and to complete contract promptly in regular order of work and in no case later than the completion of construction proper, as and when the same is actually performed. While time of performance will be considered in making award, yet in stating the time bidders should make due allowance for both probable and unforeseen difficulties that may be encountered, and they should make no proposition which they are not positive, beyond question, that they can absolutely fulfill. No credit will be given to a bidder who, with view to drawing favorable attention to his proposal, gives a time so short that it will not be reasonable and practicable for him to complete the contract, or separate part thereof, within the limit for same." \* \* \*

"25. *Interpretation of contract.*—Unless otherwise specifically set forth, the contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the officer in charge shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof." \* \* \*

"56. *Failure and delays of contractor.*—In case of failure of the contractor to fulfill his agreement (including the requirement for progress to the satisfaction of the officer in charge or higher authority), the contract may be annulled and completion secured in such manner as may be deemed best for the interests of the public service, and any excess of cost resulting from the failure, including any charges on account of delays, shall be charged to the contractor. In event, however, of the granting of additional time to the contractor for performance, the cost of inspection and other expenses and damages, including loss or damage to the work under construction by fire or other causes, to the United States from and after the date originally fixed for completion until the work shall have been satisfactorily accomplished, except in so far as the same may arise from delays for which the United States is responsible, as determined in each of these particulars by the officer in charge or by higher authority, shall be charged to the contractor and may be deducted from any money due or to become due the contractor from the United States: *Provided*, That where additional time has been granted, the United States shall also have the right to cause the remaining portion of the contract, or any part thereof, to be taken from the contractor whenever, in the opinion of the officer in charge, reasonable and satisfactory progress is not being made, and to secure completion at the expense of the contractor, together with charges as above on account of delay." \* \* \*

"61. *Strict construction of time periods in contracts.*—The Secretary of War has directed that the especial attention of all contractors, at the time of signing contracts, be called to the fact that it is the purpose of the War Department to exact a fulfillment of all contracts as to the time periods, and that they should understand when entering into contracts with this department that they need not do so with the expectation that they can be relieved from those conditions." \* \* \*

The claimant's bid, dated June 2, 1916, on which the contract was awarded, proposed to complete the work called for by the contract within 230 working days from notification of award.

4. The following supplemental agreements in modification of the contract of June 21, 1916, were entered into:

(a) Supplemental agreement, dated January 18, 1917, authorizing the contractor to install an air receiver at a point outside the pump house instead of inside the pump house as required by the original contract. This supplemental agreement provides that:

"The contractor shall receive neither more nor less dollars than stipulated in said original contract."

(b) Supplemental agreement, dated March 30, 1917, extending the time for completion of the contract of June 21, 1916, to April 15, 1917, subject to the following limitation:

"That the cost of inspection and other additional expenses and damages (including, in the case of construction work, any loss or damage to the work under construction by fire or other causes) to the United States from and after the date originally fixed for com-

pletion until the work or deliveries shall have been satisfactorily accomplished, except in so far as same may arise from delays for which the United States is responsible, as determined in each of these particulars by the officer in charge or higher authority, shall be charged to the contractor and may be deducted from any money due or to become due said contractor from the Government." \* \* \*

(c) Supplemental agreement, dated April 21, 1917, providing that the contractor may install temporary transformers which do not meet the requirements of the contract, so that the Government may utilize the pumping plant at the earliest practical date and in order that charges accruing against the contractor because of delays may be reduced as much as possible, and providing further that the contractor will install transformers meeting the requirements of the contract when they are received. This supplemental contract provides that the contractor shall receive neither more nor less than the price stipulated in the original contract, except that charges against the contractor on account of delays in final completion shall be paid in accordance with the provisions contained in Article VI of the original contract.

(d) Supplemental contract made May 18, 1917, providing that the time limit for completion of the work called for in the contract of June 21, 1916, shall be extended to May 19, 1917, with the same limitation as in the supplemental contract of March 30, 1917, above quoted.

5. On September 28, 1916, the claimant's superintendent arrived at Fort Bliss, Tex., and took certain measurements around the pumping house. He remained there about two weeks, but no work whatever was done by the contractor, other than the taking of measurements, until after the return of the superintendent to Fort Bliss, about Thanksgiving Day, 1916. He then employed a foreman and laborers which ranged in number from 2 to 12 at various times during the performance of the contract. The materials and equipment for the performance of the contract were ordered from manufacturers in the Middle States and were transported by rail to New York, then shipped by the Mallory Steamship Line to Galveston, and from there transported by rail to El Paso, which is about 6 miles distant from Fort Bliss. There was great delay in the arrival of the necessary material and equipment and the electrical pumping plant was not fully installed and in working order until October 13, 1917, and did not finally pass inspection until October 22, 1917, when it was accepted by the Government.

6. The contract price specified in the original contract of June 21, 1916, which was not altered by any of the supplemental contracts, was \$21,401. The claimant has been paid \$11,128.52, and now claims the difference between the amount received and the total contract

price, namely, \$21,401. On the other hand, the Government contends that the claimant is liable under the terms of its contract for all losses sustained by the United States through the failure of the claimant to complete the work within the time specified by the contract and amendments thereto. The Government has contended that owing to the failure of the contractor to complete its contract in the time specified, so that the Government could use the pumping station to pump water necessary for the soldiers at Fort Bliss, it was required to purchase water from the date when the contract should have been completed to the date of final acceptance of the work, at a cost amounting to \$18,618.43, in excess of the cost to operate the plant so that it would furnish a similar amount of water. The Government has therefore contended that not only is there nothing due the claimant under its contract but the claimant is indebted to the Government in the sum of \$8,345.95 for damages sustained by the Government due to claimant's failure to perform its contract in the time specified therein.

7. The question we are asked to determine is whether or not the penalty clause relating to delays in performance is nullified on account of the conditions existing relating to manufacture and transport at the time the delays were caused. A determination of this question is dependent upon the construction of the formal contract dated June 21, 1916, and the circumstances surrounding its execution.

8. Claimant, upon receipt of instructions to bidders dated May 3, 1916, and prior to submitting a bid, made inquiries of the various manufacturers of the equipment which was to be used in connection with the installation of the pumping plant at Fort Bliss, Tex., as to the probable date within which said equipment could be manufactured and delivered. The manufacturers advised claimant as to the probable time within which deliveries could be made, but they refused to guarantee deliveries at such times or at any time, or enter into a contract wherein the date of delivery was fixed. Claimant, with full knowledge of the facts that the length of time in which to make this equipment was uncertain and that deliveries would not be made at any definite time, made the contract with the Government, in which claimant covenanted to furnish the equipment and do the work within a period of 230 days.

9. By Article II of said contract it was agreed that air compressors made by the Ingersoll-Rand Co. and pumps made by the American Pump Co. shall be used in this work. Claimant ordered the air compressors from the Ingersoll-Rand Co., the pumps from the American Well Works, the motors from the Westinghouse Electric & Manufacturing Co., and the other equipment from various sub-



contractors. The Ingersoll-Rand Co. made delivery of the air compressors promptly, but there was a long delay by the American Well Works and the Westinghouse Co. in manufacturing the equipment for which they had received orders, and it was this delay which primarily caused claimant to not fulfill his contract within the contract period.

10. It was testified that with a force of good workmen and mechanics this equipment could be installed within a period of 60 days after its arrival at Fort Bliss, Tex.

11. In accordance with the plans and specifications, claimant erected over a roadway an air line, which in the month of August, 1917, and before the work had been accepted by the United States, the United States removed and placed the same under the roadway; that upon making such removal, sand was allowed to get into the pipes, by reason of which fact claimant was compelled to take up the pipes and clean the same, which work occupied a period of 11 days.

12. The last of the material and equipment necessary to complete this pumping plant was not received by the claimant until about October 18 or 19, 1917, and the same was thereupon immediately installed and plant turned over to the Government on October 22, 1917.

13. The acceptance of this plant by the United States was without prejudice to any claim the Government had against claimant for damages as provided in said contract, and simultaneous with the acceptance there was delivered to claimant's representative a statement of the account between the Government and claimant, showing that claimant was indebted to the United States by reason of the damages sustained in the sum of \$18,618.43. These damages were claimed by the Government to have accrued under Article VI of the contract, dated June 21, 1916, and the supplemental contracts, and the amount of \$18,618.43 includes the cost of inspection of the work in the sum of \$687.14, and the balance represents the difference between the cost of the water which the Government had to pay to the city of El Paso, Tex., and what it would have cost the Government if the claimant had completed the plant on March 23, 1917, as required by the original contract.

14. Claimant, when advised that the plant had been practically completed, by telegram dated October 12, 1917, notified the depot quartermaster at El Paso, Tex., that he had no objection to a test to determine completion, or incidentally to determine cost of operating plant, but by so doing waived no rights nor admitted any liability for penalties or for damages.



## DECISION.

1. The claimant has presented this case under General Order 103, alleging that he is entitled to \$10,272.48 from the Government on account of completing a pumping plant at Fort Bliss, Tex., which he had contracted to build at \$21,401, as evidenced by a formal written contract dated June 21, 1916. He contends that this Board may allow his claim and should disallow the Government's counterclaim on account of the contractor's delay in performance of his contract, owing to the fact that the delays were excusable and the contract when made did not contemplate the altered conditions in manufacture and transportation which arose during the performance of the contract. The contract has now been fully performed and the work accepted by the Government and partly paid for, with a reservation made at the time of final acceptance as to the counterclaim. We shall later determine whether this Board has any jurisdiction over this claim on the facts presented by this record. But in order that this case shall not be decided solely on a question of jurisdiction, we will first address ourselves to the points raised by the claimant.

2. The claimant's original formal contract with the Government dated June 21, 1916, was an absolute covenant on the part of the claimant to furnish on or before March 23, 1917, all machinery, material, and labor and installing complete and ready for use an electrically operated pumping equipment for the new pump house then being constructed at Fort Bliss, Tex. Claimant did not complete the work until October 22, 1917, and the acceptance by the United States did not release claimant from the damages which had accrued under the terms of said contract. Claimant asks to be relieved of the damages arising by reason of its default and alleges that there was an implied condition in its contract that the existing manufacturing and transport situation would not materially alter during the performance of the contract. In support thereof he cites various cases of English and American jurisdiction, including the English case of *Bailey v. De Crespigny* (1869; L. R. 4, Q. B. D. 180), where the rule is stated as follows:

"But where the event is of such a character that it can not reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

After carefully examining the authorities, we find there is a conflict between the English cases and the American decisions following them (some of which are referred to in claimant's brief) and the rule as announced by our Supreme Court and Federal courts which

is followed by the best considered decisions in this country. A most excellent and exhaustive review of the law is contained in the opinion of Judge Sanborn in the case of *Berg v. Erickson* (234 Fed. 817; C. C. A.), which, to our minds, is conclusive of the point raised by the claimant in this case. Fortified by the citation of many authorities, Judge Sanborn states the law as follows:

“Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible without his fault, by an act of God, or an unavoidable accident. But this rule is not generally applicable to contract obligations.

“Whether or not one, who by contract imposes upon himself an obligation or duty, is absolved from liability for this nonperformance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one who makes a positive agreement to do a lawful act is not absolved from liability for a failure to fulfill his covenant by a subsequent impossibility of performance caused by an act of God or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive covenant, to enter into and become bound by the contract, and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense. (Citing authorities.)

“But where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of intermarriage, or in a contract for the personal service of an artist, such as a singer, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible, without his fault, by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like condition.

“There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract that they must have known when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence should exist at the time of performance, or unless an indispensable thing or condition of things not then in existence should come into existence before and remain in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition of the contract that, if that thing or condition is destroyed or prevented from coming into existence before the time for the performance of the contract without fault of the obligor, either by the act of God or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. (Citing *Bailey v. De Crespigny*, L. R. 4

Q. B. 180, 185, and *Taylor v. Caldwell*, 3 Best & Smith, 826, 833, 839, cited by the claimant in his brief.)

“But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.

“It is that although general words which can not be reasonably supposed to have been used with reference to the possibility of an event may not be held to bind one, yet, where one at the time of making his contract must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure.

“Thus in *Jones v. United States* (96 U. S. 24, 29; 24 L. Ed. 644), a contractor agreed to deliver a certain kind and quantity of cloth to the United States in specified installments at fixed times. After he had delivered some of the installments, the factory which was making the cloth burned without his fault, and this made it impossible for him to deliver the remainder of the cloth at the specified times, although he, at great expense, caused it to be manufactured and tendered it to the Government later. The Government refused to accept it because it came too late. The market price of cloth had fallen, and the contractor sued the United States for the damages he sustained, on the ground that he was absolved from performance at the times specified by the act of God, the unforeseen fire. The Supreme Court denied a recovery, and said:

“‘Impossible conditions can not be performed, and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. (Chitty, Contr. 663: *Jervis v. Tompkinson*, L. H. & N. 208.)’

“In *Chicago, Milwaukee, etc., Ry Co. v. Hoyt* (149 U. S., 14; 13 Sup Ct., 784; L. Ed., 625), the Supreme Court states the rule on this subject in this way:

“‘There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it can not be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.’”

The law of Texas which the claimant invokes as the law applicable to the contract now under consideration is the same as the law an-

nounced by Judge Sanborn. In the case of *Northern Irrigation Co. v. Dodd* (Tex. Civ. App., 162 S. W., 946), it was held that the inability of an irrigation company to supply water for irrigation of land leased by it owing to a drought which caused a complete failure of the water supply in the river from which the company obtained water was not a defense to an action for failure to furnish water under a contract whereby the contractor leased the land to the plaintiff and agreed to furnish water sufficient to irrigate a crop or, in case of failure, to pay damages. The court held that even if the drought be considered an act of God it is not a sufficient excuse for a breach of a contract, and on this point said:

"The act of God may be defined to be the result of such natural causes as could not reasonably have been foreseen and provided against. \* \* \* We do not think that because there has not been a severe drought in Texas for 10 years prior to any given period, it can be said that such drought could not reasonably be anticipated."

This case is not unlike *Link, Belt Engineering Co. v. The United States* (C. C. A.; 142 Fed., 243), where it appears that the contractor agreed to furnish certain materials made from steel, but owing to the congested conditions at the steel mills, which he had notice of, he was unable to obtain the equipment within the time specified and was not able to complete his contract within the contract period. The court held that the contract on the part of the Link Belt Engineering Co., being an absolute covenant on its part to complete the work within the contract period, rendered it liable for all damages which had accrued.

3. The facts of the case as presented by this record are that the claimant made a positive contract to obtain the material and equipment and to do the work required to complete a pumping house at Fort Bliss within 230 days from the date of the award of the contract, namely, for the performance of the contract on or before March 23, 1917. The contract with the Government contains no reservations upon this contractual liability whatever. The claimant made subcontracts with his material men for supplying, f. o. b. subcontractor's plant, various items of equipment necessary to perform his contract with the Government. In those contracts there is no provision as to date of delivery, and the claimant on the witness stand frankly stated that the subcontractors would not make contracts specifying a definite date of delivery. Even admitting that he had oral promises from the subcontractors that the material would be shipped, those promises were not contractual nor enforceable against the subcontractor and may not be considered in this case. The subcontractors greatly delayed the delivery of the equipment, and it has frequently been held that delay of subcontractors do not relieve a prime contractor with the Government in perform-

ing his contract on schedule time. The cause of the delay of the subcontractors is immaterial. (See 6 Comptroller of Treasury, Dec., 748; 10 id., 694; 12 id., 167; 13 id., 853; 15 id., 812; 17 id., 602; 18 id., 7; 19 id., 279; *Morris v. United States*, 50 Ct. Cl., 154.)

Other facts bearing on the question of delay are that the equipment was shipped by freight, by the subcontractors, from the subcontractors' plants in the Northern States to New York and transported by sea to Galveston and by freight to Fort Bliss. The claimant alleges substantial delays in these shipments, but has not shown what was the average time consumed in prewar periods, and most of these shipments were, in fact, made before the declaration of war. In the case of *Northern Pacific Railway Co. v. American Trading Co.* (195 U. S., 439), the Supreme Court held that delays in transit due to war was a risk which must be assumed by the company that agreed to transport in a given time, because the contract in question was an unqualified undertaking to deliver at a given time. The rule announced by the Supreme Court in the transportation case is, therefore, the same as applied to delays of subcontractors.

The claimant's contract required him to obtain completely manufactured equipment and cause it to be transported to Fort Bliss, Tex., and install it prior to March 23, 1917. This was an unqualified undertaking, enlarged only by the extensions of time granted by the Government in supplemental contracts with the claimant, extending the time of performance to May 19, 1917. Under the authorities cited, we are of the opinion that no excuse is shown relieving the claimant from his undertaking, which was voluntarily made by him and incorporated in a formal written contract which contains no exceptions or qualification. The general words used in the contract must be held to cover delays of subcontractors and of transportation which by common knowledge are known to be frequent, though the extent of such delays may seldom be definitely foretold. Except in two instances, none of the material was shipped by express. The bulk of the material which caused the delay was shipped by freight and sea and not by express. The claimant alleges that performance was impossible. The facts are that performance was possible, because the claimant did perform his contract, and that a large part of the delay could have been avoided had he been willing to incur the necessary expense of shipping by express.

4. We are, therefore, of the opinion that on the facts presented by this record the claimant has failed to show any grounds of excuse for failure to perform his contract with the Government within the time stipulated or any reasons why he should not be held to the terms of the contract as written.

5. But underlying this claim is the fact that the claimant entered into a formal written contract to equip a water-power plant at Fort

Bliss, Tex., which contract he has now fully performed and the work has been accepted by the Government, subject to its counterclaim against the contractor. The Secretary of War and hence the Board of Contract Adjustment, therefore, has no power to settle this contract because it is no longer in existence, but has been terminated by performance. The claim of the Perry Co. and the counterclaim of the United States can only be determined in the Treasury Department (sec. 368, U. S. Comp. Stats.) or by court having jurisdiction. This has been repeatedly decided by this Board: United Disposal & Recovery Co. (3 Board Cont. Adj. Dec. 131); E. C. Gatlin Importing Co. (3 id., 73); the Bloch Co. (3 id., 64); Dewey Bros Co. (3 id., 248); Collegiate Balloon School, claim 2238, decided March 11, 1920.

6. For the reasons stated the relief prayed for be and the same is hereby denied.

DISPOSITION.

This claim is accordingly dismissed.

Col. Delafield and Mr. Cavanaugh concurring.



JUNE 22, 1920.

**Case No. 2682.**

***In re* CLAIM OF DETROIT COPPER & BRASS ROLLING MILLS.**

- 1. TERMINATION CLAUSE.**—When a suspended formal contract contains a termination clause, settlement must be made within the terms of the termination clause, and no item of expense can be allowed unless provided for therein.
- 2. SUBSTITUTED MATERIAL.**—When the claimant was manufacturing brass rods from material furnished by the Government, and instead of using copper furnished for that purpose, used the copper on other contracts and substituted a cheaper and secondary material for the copper on this contract, an excess of such secondary material at the suspension of the contract is not a proper allowance under the termination clause because the substitution was not authorized, and it was not necessary for the performance of the contract.
- 3. ANTICIPATING CONTRACT—EXCESS INVENTORY.**—When at the suspension of Government contracts claimant shows an excess inventory of material on hand over prewar years, but the evidence shows that such excess was not purchased on the faith of or for use in any particular contract, but merely provided in anticipation of future contracts, which it hoped to get, no allowance can be made for such material.
- 4. CLAIM AND DECISION.**—Claim under General Order 103 on formal contract for \$49,141.70 excess materials. Held, claimant not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders No. 103, War Department, 1918, and is for \$49,141.70, under the following circumstances:

2. On August 18, 1918, the claimant entered into a formal contract, No. P-13757-3385-A, with the United States Government, acting through Samuel McRoberts, colonel, Ordnance, United States Army, by which it agreed to manufacture 1,452,105 pounds of round brass rods for \$0.0603 each and 319,815 pounds round brass rods at \$0.0724 each, all at a total price of \$110,716.54.

By the terms of the contract the United States was to furnish, without cost to the contractor, 1,089,731 pounds of electrolytic copper and 682,189 pounds of grade B spelter, f. o. b. contractor's plant, the contractor to pay all switching, hauling, demurrage, or



storage charges. The contract further provides that the contractor shall account for material furnished by the Government in finished product, scrap, or unused material. The price to be paid the contractor was a toll or conversion charge for converting the raw materials into brass rods. Said contract contains the customary termination clause, which provides that in event of suspension of the contract the United States shall pay the contractor the contract price for all articles accepted by the Government, and—

“The United States shall also pay to the contractor the cost of materials and component parts purchased by the contractor for the performance of this contract and then on hand *in an amount not exceeding the requirements for the completion of this contract*, provided they fully comply with specifications, and also all cost shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the contractor on all obligations incurred necessarily and solely for the performance of this contract, of which the contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance might deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract. Title to all such materials and component parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.”

In the instructions to bidders on which the contract was based there are specifications giving the percentages of metals that shall comprise brass rods acceptable to the Government. The following provision also appears in said instructions to bidders:

“In the manufacture of these rods there shall be used the raw materials furnished by the United States, as hereinafter specified, or such raw materials in all other respects equivalent (in the judgment of the Government inspector) to that furnished by the United States.”

3. On December 14, 1918, the Government sent to the claimant a notice to suspend operation under the contract, which the claimant acknowledged and complied with on December 20, 1918, at which time the contract was 69 per cent completed. The claimant has been paid \$75,766.84 for the rods delivered under this contract.

4. It appears that the claimant company was in performance of eight different contracts for the manufacture of brass rods at the time the notice of suspension was sent to it, on December 14, 1918. The claimant filed claims with the Detroit district claims board on all eight of these contracts, and an adjustment was made on six of them, leaving this claim and claim No. 150-C-2683, in which a final settlement was not reached, although the Detroit district board made awards in each of these two cases which were accepted by the claimant. The Ordnance Claims Board so revised these two awards and

reduced them that the claimant has brought these two claims to the Board of Contract Adjustment for final determination.

5. The award which was made by the Detroit district claims board on September 24, 1919, and accepted by the claimant is as follows:

Allowances:

Unworked direct materials.....	\$96, 646. 99
Indirect materials .....	2, 395. 43
Direct labor and overhead expense.....	11, 427. 89
Claims for other compensation.....	18, 850. 26
(a) Handling .....	\$354. 77
(aa) Storage.....	290. 20
(b) Excess inventory.....	9, 402. 15
(bb) Defective material.....	59. 96
(c) 10 per cent profit on labor and overhead....	1, 178. 27
(cc) Administrative expense and unabsorbed overhead.....	3, 658. 71
(d) Distribution on spelter storage and crane....	514. 22
(e) 5 per cent interest on direct and indirect material .....	3, 391. 98
Total of contractor's claim.....	129, 320. 57

Deductions:

Allowance to the United States for fair value of property retained by contractor in this settlement (sometimes called salvage value).....	80, 178. 87
Total .....	49, 141. 70

6. While the formal award of the Ordnance Claims Board is not before us, it appears that on February 28, 1920, the Ordnance Claims Board notified the Detroit district claims board that it had made a new award, which appears from a letter of February 25, 1920, from the Advisory Section to the Claims Board, to have totaled \$939.94, and stating that a settlement contract would be drawn for presentation to the claimant. It appears from the record that the Claims Board addressed a communication to the Contract Section, dated February 20, 1920, requesting that a settlement contract be drawn on account of the following items on contract No. P-13757-3385-A having been allowed:

Indirect materials (crucibles).....	\$2, 395. 43
Three per cent on crucibles as administrative and unabsorbed overhead (on indirect materials).....	71. 86
Interest on crucibles.....	47. 90
Yard crane amount charged to this contract.....	452. 19
Distribution of spelter storage charged to this claim.....	62. 03
Defective material.....	59. 96
Total .....	3, 089. 37
Deductions for salvage for crucibles (retained by contractor as its property) .....	2, 149. 43
Total .....	939. 94

From the decision of the Ordnance Claims Board allowing the claimant only \$939.94, the claimant has appealed to the Board of Contract Adjustment.

7. The original claim on this contract as filed by the Detroit district claims board and later sent to the Ordnance Claims Board contained a number of items of claims as heretofore set out in paragraph 5 but the appeal to this Board is only on two items, namely, Item I, loss of billets on hand, \$39,738.55; and Item II, loss on excess inventory, \$9,402.15, aggregating \$49,141.70. These items seem to somewhat overlap and intermingle with the items of claim as originally presented. However, this being considered a hearing *de novo* and as there are only two items presented to this Board for consideration, they must be considered in a manner here presented and irrespective of the original claim. Each item will be considered separately.

8. Item I. Loss on billets on hand, \$39,738.55: This claim is based entirely upon the secondary metal billets which the claimant alleges it purchased for the fulfillment of this contract, above referred to and which was left on claimant's hands at the suspension of the contract, some 547,575 pounds. It is on account of the depreciation in the value of this material that reimbursement is asked. The Government was required by the contract to furnish the claimant an equal number of pounds of virgin copper and spelter for a like number of pounds of finished rods to be manufactured by the contractor. The contractor was to be paid a toll for converting the raw metal furnished by the Government into the finished brass rods.

The claimant's contentions regarding this item resolve themselves into two propositions:

(a) The first contention is that, though its contract required the Government to furnish a pound of raw material for a pound of finished rod, there was a loss of the raw metal in the manufacturing process, and so the contractor had to acquire and have on hand two and one-half times the weight of the raw materials to make a pound of finished product. The claimant's witnesses testified in support of the first proposition, and stated that the large amount of scrap which was lost in the manufacturing process was reworked and used later in the manufacture of brass rods. The manufacturing process of making a set of brass rods took about five or six days. Capt. Leslie S. Gordon, Ordnance, United States Army, who had been the officer in charge of brass cartridge case disks, cartridge cases, and fuses for the Procurement Division, Ordnance Department, testified that it was necessary for a brass rod manufacturer to have on hand a sufficient supply of raw materials to complete the cycle of operation process of the plant. After this cycle is com-

pleted, and the metal is going through the various processes, the daily production only requires the daily output plus the scrap and shrinkage. He also testified that it was generally conceded that the reservoir of raw materials should be two and one-half times the quantity to be produced, so as to keep up production to the maximum, but that after the last day's running at maximum, the subsequent days of running would produce only the amounts left over from the previous cycles.

(b) The second contention is that the contract price did not permit the claimant to derive a reasonable profit from the use of virgin copper supplied by the Government, and so the claimant received the virgin copper from the Government but did not use it on its brass-rod contracts, but used instead billets made out of secondary metals which it purchased at a price cheaper than the price of virgin copper. This it claims to have done with knowledge of the Government, and that the fixing of the contract price was made in contemplation of the use of secondary metals and so as to conserve virgin copper. It contends that other brass rod manufacturers were also using secondary metals without objection by the Government, and that Capt. Gordon authorized the claimant to do so.

The question at issue is whether the claimant was authorized to use secondary metals at all, in so much as the Government was furnishing primary metals. The claimant made an effort to show, through the testimony of Mr. Everett Morse, of the Priorities Committee of the War Industries Board, that the toll prices on brass rod contracts was fixed on the assumption that secondary metals were to be used instead of the virgin metals furnished by the Government. Mr. Morse testified that his instructions were to have nothing to do with prices except to advise the procurement officers when requested. He did advise with Capt. Gordon, and after preparing two lists of prices for brass rods a final price list was agreed upon which contemplated the use of secondary metals, but to what extent the witness did not know. Mr. Morse never advised any brass manufacturer he could use secondary metals in the manufacture of brass rods. He testified that although there was a copper shortage feared during the summer of 1918, there never developed any real shortage during the war.

Mr. John R. Searles, assistant general manager of the claimant company during the negotiations and the operations under this contract, testified that the Government knew that the claimant was using secondary metals in the manufacture of brass rods, but he could not state whether it was known that the claimant was actually buying secondary materials outside. Mr. Searles further testified that the

prices for the rods as fixed by Capt. Gordon were predicated upon the use of secondary metals, and that Capt. Gordon told the claimant it must look for its profit in the use of secondary metals.

Capt. Leslie S. Gordon testified that he worked out with Mr. Morse the price to govern the operation of the different brass manufacturers in fulfilling their brass products contracts. These prices were predicated on the cost as submitted by the Government manufacturers, including the Detroit Copper & Brass Rolling Mills. These costs as submitted by the various reputable brass manufacturers were below the price as fixed by witness. The prices fixed were based on the costs according to the size of the producers. The claimant was placed in the second class. In testifying Capt. Gordon stated:

"At the time we settled these prices our idea was to show a margin of profit between the cost as submitted and the prices at which we intended to purchase the rods, and no discussion was ever had with any of the brass producers to the effect that part of their profit must come out of the use of scrap."

Capt. Gordon further testified that the Government realized that the brass mills were using scrap material and that it was perfectly willing that they should use secondary metals, but the prices were not fixed in contemplation of the use of secondary metals and, in fact, no mention of secondary metals was made, but there was a margin of profit between the cost as submitted by the claimant and the price as fixed by him. This witness did state, however, that it is the universal factory practice to use secondary metals in the manufacture of brass rods.

It appears from the testimony of Capt. H. W. Churchill, Army inspector of ordnance at claimant's plant, that the specifications accompanying the contract did not permit the acceptance of brass rods made of secondary metals. Capt. Churchill wrote the Inspection Division at Washington for permission to accept rods with such defects in them as would come only from the use of secondary metals, and in reply received a letter dated August 6, 1918, reading as follows:

"1. This is to advise you that under specifications RA-173-O, April 12, 1918, it will be satisfactory for the present to permit impurity 0.25 per cent tin in both drill and forging rods, in order that scrap accumulating at the brass mills may be used so as to conserve copper and spelter. This is not to be considered as an amendment to the above specifications." \* \* \*

9. Item II: Loss on excess inventory, \$9,402.15. This item is based on the claimant's inventory of materials on hand December 31, 1918, which was alleged to have been considerably in excess of prewar inventories. This amount the claimant contends was the

result of having to supply all the reworked or vehicle copper for use in carrying on Government work during the war. The method of arriving at the amount of inventory was by taking the inventory for three prewar years, averaging that, and striking the difference between that amount and the amount shown by the inventory of December 31, 1918. The claimant alleges that the excess thus shown is due entirely to having carried on Government work. The claimant has divided this excess proportionately over all of its contracts, and so applied the sum of \$9,402.15 to this contract, for which it is asking reimbursement. The billets as referred to in Item I are not included in this item.

Mr. John R. Searles, assistant general manager of the claimant company, testified that the claimant had figured that the war was going on and bought this excess material in anticipation of the contracts flowing in.

It does not appear that any Government agent ever authorized or directed the claimant to purchase metal required for the filling of the actual contracts which claimant had, under the terms of which the United States was to furnish the metals for the manufacture of the brass rods, or authorized or directed the claimant to acquire an excess supply of raw materials for future anticipated contracts.

10. It will be noted that the claimant is here asking for a sum which, added to what it has already received, would allow it \$14,192 more than it would have received had the contract been completed.

#### DECISION.

1. Item I: Loss on billets on hand, \$39,738.55. Under the terms of the claimant's contract, No. P-13757-3385-A, the United States was to furnish the claimant with 1,771,910 pounds of metal necessary to make brass rods and to pay the claimant company a toll for manufacturing 1,771,910 pounds of finished round brass rods. The contract required the Government to furnish virgin copper and spelter, and the specifications were drawn so as to permit only of brass rods manufactured out of virgin copper. It is admitted that the claimant had on hand at all times a sufficient quantity of metal furnished by the Government for the completion of all its Government contracts. The contract was suspended when it was 69 per cent complete, and the claimant has been paid for the brass rods delivered to and accepted by the Government. It now seeks reimbursement for the losses alleged to have been sustained due to the suspension of this contract.

2. As this contract contained a termination clause which provided for the allowances the contractor should receive in event of suspension of the contract, that clause must govern the allowances which



are to be made. It provides that the United States will pay for the completed articles accepted and will also pay:

"The cost of materials and component parts purchased by the contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract, provided they comply with the specifications, and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid."

The billets which the claimant purchased on its own responsibility and for which it now seeks reimbursement, were composed of secondary metals and not of virgin copper. The evidence shows that the specifications did not permit the acceptance of brass rods made of secondary metals and hence these billets made of secondary metals may not be considered material on hand which complies with the specifications as set forth in the termination clause. It would seem that the termination clause of the contract precludes making any allowance for these billets.

3. The contract under which the claimant was operating required the Government to furnish virgin copper and spelter pound for pound for the brass rods which the claimant was to manufacture. The price to be paid the claimant was a toll or conversion charge for converting the raw metals into brass rods. The claimant contends that the conversion prices which it was to be paid did not permit it, with profit, to use the virgin copper supplied by the Government. So it bought cheaper secondary metals and used them in the performance of this contract, but diverted the virgin copper to other contracts in which it was to furnish the raw materials, thereby deriving a profit out of its contracts between the cost of virgin copper and the cost of the cheaper secondary-metal billets.

There is not a suggestion in the contract itself that any materials were to be used other than the materials furnished by the Government. There is no evidence that any agent of the Government ever directed the claimant to purchase the secondary metals, and if the claimant did purchase the secondary metals it did so on its own authority and at its own peril so as to make what saving it could out of its Government contracts. The testimony of Captain Gordon, who fixed the price for brass rods contracts, is clear that the prices were not fixed based on the use of secondary metals, but that the contract, as written, which provided that the Government should furnish virgin copper and spelter for the performance of the contract, bore out his intention as to what material should be used and his basis of computing the cost so that the contractor could obtain a reasonable profit. These prices were fixed on data submitted by the various reputable brass-rod manufacturers and in fixing the prices it was not contemplated that the contractor use secondary metals, but that he should use the metals to be furnished by the Government.



Evidence that the contractor was to furnish secondary metals for the performance of the contract, as attempted to be introduced, is wholly inadmissible in that it seeks to vary the terms of the written contract, which required the Government to furnish the virgin copper and spelter. If this evidence may be considered, however, as competent to show that the prices as fixed contemplated the use of secondary metals by the contractor, it is wholly refuted by the testimony of Capt. Gordon.

4. It is contended that the Government knew that the claimant was using secondary metals and that the Government was anxious to conserve virgin copper. This is admitted; but the specifications did not permit the acceptance of rods made out of secondary metals, and when the Inspection Division at Washington authorized the acceptance of rods "for the present" made out of scrap it specifically stated in its letter of authorization that:

"This is not to be considered as an amendment to the above specifications."

Therefore, the acceptance of rods made of the secondary metals, for the time being, may not be considered a waiver of the terms of the contract and specifications, so as to impose liability on the Government to reimburse the claimant for the secondary metals it had purchased, which were duplications of material furnished by the Government with which to complete the contract. The evidence shows that the claimant had, at all times, on hand a sufficient supply of virgin copper furnished by the Government with which to complete its existing contract, which it could have drawn from the common reserve fund of copper at its plant. We see no reason why the Government should be required to reimburse it for the duplication of raw materials purchased by it, so that it could make greater profits, when it could have completed the contract out of the materials furnished by the Government.

5. It is clear to our minds that the secondary metals the claimant purchased, and which were on hand at the time of the suspension of the contract, was material exceeding the requirements for completion of this contract, and was not material which complied with the specifications, and therefore the claimant is not entitled to reimbursement for such secondary metals under the provisions of the termination clause of the contract.

The decision of the Ordnance Claims Board, disallowing this item, is, therefore, affirmed.

6. Item II: Loss on excess inventory, \$9,402.15. This item, termed "Loss on excess inventory," is for the value of material on hand December 31, 1918, less the average annual inventory of materials on hand taken for three years before the war. The claimant

contends that it is entitled to reimbursement for this excess inventory because the additional stock on hand was acquired and carried by it in contemplation of fulfillment of future orders from the Government which it expected to get. It is clear that no agent of the Government authorized or instructed the claimant to purchase this excess material which was not purchased for the performance of any existing contract which claimant had obtained from the Government. Mr. Searles, assistant general manager of claimant company, frankly stated that he had expected the war to last and that the claimant would get more contracts and this excess material was bought in contemplation of such future contracts. We know of no ground upon which an allowance for such excess material, bought in contemplation of future contracts, can be made. It is admitted that this excess material was not necessary for the performance of contract No. P-13757-3385-A and the termination clause of that contract permits an allowance to the contractor only of materials and component parts purchased by the contractor for the performance of the contract not exceeding the requirements for the completion of the contract.

It is, therefore, the opinion of this Board that the decision of the Ordnance Claims Board, disallowing the item of claim for loss on excess inventory, was correct and we, therefore, affirm that decision.

7. The Board of Contract Adjustment, therefore, recommends to the Secretary of War that an adjustment be made with the claimant in accordance with this opinion and with the settlement previously proposed by the Ordnance Claims Board and that a settlement contract based on such adjustment be tendered to the claimant in final settlement of its contract No. P-13757-3385-A.

Col. Delafield and Mr. Hendon concurring.

JUNE 22, 1920.

**Case No. 2683.**

*In re* **CLAIM OF DETROIT COPPER & BRASS ROLLING MILLS.**

1. **TERMINATION CLAUSE.**—When a suspended formal contract contains a termination clause, settlement must be made within the terms of the termination clause, and no item of expense can be allowed unless provided for therein.
2. **SUBSTITUTED MATERIAL.**—When the claimant was manufacturing brass rods from material furnished by the Government, and instead of using copper furnished for that purpose, used the copper on other contracts and substituted a cheaper and secondary material for the copper on this contract; an excess of such secondary material at the suspension of the contract is not a proper allowance under the termination clause because the substitution was not authorized, and it was not necessary for the performance of the contract.
3. **ANTICIPATING CONTRACT—EXCESS INVENTORY.**—When at the suspension of Government contracts claimant shows an excess inventory of material on hand over prewar years, but the evidence shows that such excess was not purchased on the faith of or for use in any particular contract, but merely provided in anticipation of future contracts, which it hoped to get, no allowance can be made for such materials.
4. **CLAIM AND DECISION.**—Claim under General Order 103 on formal contract for \$194,540.14 excess materials. Held, claimant not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$194,540.14, under the following circumstances:

2. On October 18, 1918, the claimant entered into a formal contract No. P-16700-4000-A with the United States Government, acting through Samuel McRoberts, colonel, Ordnance, United States Army, by which it agreed to manufacture 2,735,700 pounds three-fourths inch or over, round brass rods at \$0.0603 per pound and 264,300 pounds three-fourths inch round brass rods at \$0.0724 per pound, total price of said rods to be \$184,098.03.

By the terms of the contract, the United States was to furnish, without cost to the contractor, 1,845,000 pounds of prime lake or electrolytic copper and 1,155,000 pounds of spelter according to the specifications annexed to the contract, f. o. b. contractor's plant, the contractor to pay all switching, hauling, demurrage, or storage charges. The contract further provides that the contractor shall account for material furnished by the Government in finished product, scrap, or unused material. The price to be paid the contractor was a toll or conversion charge for converting the raw materials into brass rods. Said contract contains the customary termination clause which provides that in event of suspension of the contract the United States shall pay the contractor the contract price for all articles accepted by the Government and—

“the United States shall also pay to the contractor the cost of materials and component parts purchased by the contractor for the performance of this contract and then on hand *in an amount not exceeding the requirements for the completion of this contract*, provided they fully comply with specifications and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the contractor on all obligations incurred necessarily and solely for the performance of this contract, of which the contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance might deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract. Title to all such materials and component parts paid for by the United States under this article shall immediately upon such payment vest in the United States.”

3. On December 14, 1918, the Government sent to the claimant a notice to suspend operation under the contract, which the claimant acknowledged and complied with on December 20, 1918, at which time the contract was about 21 per cent completed. The claimant has been paid \$40,774.95 for the rods delivered under this contract.

4. It appears that the claimant company was in performance of eight different contracts for the manufacture of brass rods at the time the notice of suspension was sent to it on December 14, 1918. The claimant filed claims with the Detroit district claims board on all eight of these contracts and an adjustment was made on six of them, leaving this claim and claim No. 2682, in which a final settlement was not reached, although the Detroit district board made awards in each of these two cases which were accepted by the claimant. The Ordnance Claims Board so revised these two awards and reduced them that the claimant has brought these two claims to the Board of Contract Adjustment for final determination.

5. The award which was made by the Detroit district claims board on September 24, 1919, and accepted by the claimant, is as follows:

## Allowances:

Unworked direct materials-----	\$436, 836. 36
Indirect materials -----	10, 360. 70
Direct labor and overhead expense-----	16, 792. 32

## Claims for other compensation:

(a) Additional expense and unabsorbed overhead -----	\$16, 391. 90
(b) Interest-----	15, 232. 77
(c) Handling-----	1, 615. 56
(d) Storage-----	690. 70
(e) Excess inventory -----	40, 703. 19
(f) 10 per cent profit on labor and overhead--	1, 840. 79
(g) Distribution yard crane and spelter storage-----	1, 175. 36
	<u>77, 650. 27</u>

Total of contractor's claim----- 541, 639. 65

## Deductions:

Allowance to the United States for fair value of property retained by contractor in this settlement (sometimes called salvage value)-----	347, 099. 51
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Total ----- 194, 540. 14

6. While the formal award of the Ordnance Claims Board is not before us, it appears that on February 28, 1920, the Ordnance Claims Board notified the Detroit district claims board that it had made a new award which appears from a letter of February 25, 1920, from the advisory section to the claims board, to have totaled \$2,757.39 and stating that a settlement contract would be drawn for presentation to the claimant. It appears from the record that the Claims Board addressed a communication to the Contract Section, dated February 20, 1920, requesting that a settlement contract be drawn on account of the following items on contract No. P16700-4000A, having been allowed:

Indirect materials-----	\$10, 360. 70
3 per cent on crucibles as administrative and unabsorbed overhead--	310. 82
Interest on crucibles-----	207. 21
Yard crane-----	1, 033. 57
Distribution of spelter storage-----	141. 79

Total----- 12, 054. 09

Deduction for salvage on indirect materials----- 9, 296. 70

Total----- 2, 757. 39

From the decision of the Ordnance Claims Board allowing the claimant only \$2,757.39, the claimant has appealed to the Board of Contract Adjustment.

7. The original claim on this contract as filed by the Detroit district claims board and later sent to the Ordnance Claims Board contained a number of items of claim as heretofore set out in paragraph 5, but the appeal to this Board is only on two items, namely, Item I,

loss on billets on hand, \$153,832, and Item II, loss on excess inventory, \$40,707.19, aggregating \$194,540.14. These items seem to somewhat overlap and intermingle with the items of claims as originally presented. However, this being considered a hearing *de novo* and as there are only two items presented to this Board for consideration, they must be considered in a manner here presented and irrespective of the original claim. Each item will be considered separately.

8. Item I: Loss on billets on hand, \$153,832.95. This claim is based entirely upon secondary metal billets which the claimant alleges it purchased for the fulfillment of this contract, above referred to, and which was left on claimant's hand at the suspension of the contract, some 2,918,102 pounds. It is on account of the depreciation in the value of this material that reimbursement is asked. The Government was required by the contract to furnish the claimant an equal number of pounds of virgin copper and spelter for a like number of pounds of finished rods to be manufactured by the contractor. The contractor was to be paid a toll for converting the raw metal furnished by the Government into the finished brass rods.

The claimant's contentions regarding this item resolve themselves into two propositions:

(a) The first contention is that though its contract required the Government to furnish a pound of raw metal for a pound of finished rod, there was a loss of the raw metal in the manufacturing process, and so the contractor had to acquire and have on hand two and one-half times the weight of the raw materials to make a pound of finished product. The claimant's witnesses testified in support of the first proposition and stated that the large amount of scrap which was lost in the manufacturing process was reworked and used later in the manufacture of brass rods. The manufacturing process of making a set of brass rods took about five or six days. Capt. Leslie S. Gordon, Ordnance, United States Army, who had been the officer in charge of brass cartridge-case disks, cartridge cases, and fuses for the Procurement Division, Ordnance Department, testified that it was necessary for a brass-rod manufacturer to have on hand a sufficient supply of raw materials to complete the cycle of operation process of the plant. After this cycle is completed and the metal is going through the various processes the daily production only requires the daily output plus the scrap and shrinkage. He also testified that it was generally conceded that the reservoir of raw materials should be two and one-half times the quantity to be produced, so as to keep up production to the maximum, but that after the last day's running at maximum the subsequent days of running would produce only the amounts left over from the previous cycles.



(b) The second contention is that the contract price did not permit the claimant to derive a reasonable profit from the use of virgin copper supplied by the Government, and so the claimant received the virgin copper from the Government but did not use it on its brass-rod contracts, but used instead billets made out of secondary metals which it purchased at a price cheaper than the price of virgin copper. This it claims to have done with knowledge of the Government, and that the fixing of the contract price was made in contemplation of the use of secondary metals and so as to conserve virgin copper. It contends that other brass-rod manufacturers were also using secondary metals without objection by the Government, and that Capt. Gordon authorized the claimant to do so.

The question at issue is whether the claimant was authorized to use secondary metals at all, in so much as the Government was furnishing primary metals. The claimant made an effort to show, through the testimony of Mr. Everett Morss, of the Priorities Committee of the War Industries Board, that the toll prices on brass-rod contracts were fixed on the assumption that secondary metals were to be used, instead of the virgin metals furnished by the Government. Mr. Morss testified that his instructions were to have nothing to do with prices except to advise the procurement officers when requested. He did advise with Capt. Gordon, and after preparing two lists of prices for brass rods, a final price list was agreed upon which contemplated the use of secondary metals, but to what extent the witness did not know. Mr. Morss never advised any brass manufacturer he could use secondary metals in the manufacture of brass rods. He testified that although there was a copper shortage feared during the summer of 1918, there never developed any real shortage during the war.

Mr. John R. Searles, assistant general manager of the claimant company during the negotiations and the operations under this contract, testified that the Government knew that the claimant was using secondary metals in the manufacture of brass rods, but he could not state whether it was known that the claimant was actually buying secondary materials outside. Mr. Searles further testified that the prices for the rods as fixed by Capt. Gordon were predicated upon the use of secondary metals, and that Capt. Gordon told the claimant it must look for its profit in the use of secondary metals.

Capt. Leslie S. Gordon testified that he worked out, with Mr. Morss, the price to govern the operation of the different brass manufacturers in fulfilling their brass products contracts. These prices were predicated on the cost as submitted by the Government manufacturers, including the Detroit Copper & Brass Rolling Mills. These costs as submitted by the various reputable brass manufacturers were below the price as fixed by witness. The prices fixed were



based on the costs according to the size of the rods produced and placed in three classes according to the size of the producers. The claimant was placed in the second class. In testifying Capt. Gordon stated:

"At the time we settled these prices our idea was to show a margin of profit between the cost as submitted and the prices at which we intended to purchase the rods, and no discussion was ever had with any of the brass producers to the effect that part of their profit must come out of the use of scrap."

Capt. Gordon further testified that the Government realized that the brass mills were using scrap material and that it was perfectly willing that they should use secondary metals, but the prices were not fixed in contemplation of the use of secondary metals and, in fact, no mention of secondary metals was made, but there was a margin of profit between the cost as submitted by the claimant and the price as fixed by him. This witness did state, however, that it is the universal factory practice to use secondary metals in the manufacture of brass rods.

It appears from the testimony of Capt. H. W. Churchill, Army inspector of ordnance at claimant's plant, that the specifications accompanying the contract did not permit the acceptance of brass rods made of secondary metals. Capt. Churchill wrote the Inspection Division at Washington for permission to accept rods with such defects in them as would come only from the use of secondary metals, and in reply received a letter dated August 6, 1918, reading as follows:

"1. This is to advise you that under specifications EA-173-O, April 12, 1918, it will be satisfactory for the present to permit impurity 0.25 per cent tin in both drill and forging rods, in order that scrap accumulating at the brass mills may be used so as to conserve copper and spelter. This is not to be considered as an amendment to the above specifications." \* \* \*

9. Item II: Loss on excess inventory, \$40,707.19. This item is based on the claimant's inventory of materials on hand December 31, 1918, which was alleged to have been considerably in excess of prewar inventories. This amount the claimant contends was the result of having to supply all the reworked or vehicle copper for use in carrying on Government work during the war. The method of arriving at the amount of inventory was by taking the inventory for three prewar years, averaging that and striking the difference between that amount and the amount shown by the inventory of December 31, 1918. The claimant alleges that the excess thus shown is due entirely to having carried on Government work. The claimant has divided this excess proportionately over all of its contracts and so applied the sum of \$40,707.19 to this contract, for which it is asking

reimbursement. The billets as referred to in Item I are not included in this item.

Mr. John R. Searles, assistant general manager of the claimant company, testified that the claimant had figured that the war was going on and bought this excess material in anticipation of the contracts flowing in.

It does not appear that any Government agent ever authorized or directed the claimant to purchase metal required for the filling of the actual contracts which claimant had, under the terms of which the United States was to furnish the metals for the manufacture of the brass rods, or authorized or directed the claimant to acquire an excess supply of raw materials for future anticipated contracts.

10. It will be noted that the claimant is here asking for a sum which added to what it has already received would allow it \$52,217.06 more than it would have received had the contract been completed.

#### DECISION.

1. Item I. Loss on billets on hand, \$153,632.95. Under the terms of the claimant's contract, No. P-16700-4000-A, the United States was to furnish the claimant with 3,000,000 pounds of metal necessary to make brass rods and to pay the claimant company a toll for manufacturing 3,000,000 pounds of finished round brass rods. The contract required the Government to furnish virgin copper and spelter, and the specifications were drawn so as to permit only of brass rods being manufactured out of virgin copper. It is admitted that the claimant had on hand at all times a sufficient quantity of metal furnished by the Government for the completion of all its Government contracts. The contract was suspended when it was 21 per cent complete, and the claimant has been paid for the brass rods delivered to and accepted by the Government. It now seeks reimbursement for the losses alleged to have been sustained due to the suspension of this contract.

2. As this contract contained a termination clause which provided for the allowances the contractor should receive in event of suspension of the contract, that clause must govern the allowances which are to be made. It provides that the United States will pay for the completed articles accepted and will also pay:

"the cost of materials and component parts purchased by the contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract, provided they comply with the specifications and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid." \* \* \*

The billets which the claimant purchased on its own responsibility and for which it now seeks reimbursement were composed of secondary metals and not of virgin copper. The evidence shows that the specifications did not permit the acceptance of brass rods made of secondary metals, and hence these billets made of secondary metals may not be considered material on hand which complies with the specifications as set forth in the termination clause. It would seem that the termination clause of the contract precludes making any allowance for these billets.

3. The contract under which the claimant was operating required the Government to furnish virgin copper and spelter pound for pound for the brass rods which the claimant was to manufacture. The price to be paid the claimant was a toll or conversion charge for converting the raw metals into brass rods. The claimant contends that the conversion prices which it was to be paid did not permit it, with profit, to use the virgin copper supplied by the Government. So it bought cheaper secondary metals and used them in the performance of this contract, but diverted the virgin copper to other contracts in which it was to furnish the raw materials, thereby deriving a profit out of its contracts between the cost of virgin copper and the cost of the cheaper secondary metal billets.

There is not a suggestion in the contract itself that any materials were to be used other than the materials furnished by the Government. There is no evidence that any agent of the Government ever directed the claimant to purchase the secondary metals, and if the claimant did purchase the secondary metals it did so on its own authority and at its own peril so as to make what saving it could out of its Government contracts. The testimony of Capt. Gordon, who fixed the prices for brass rods contracts, is clear that the prices were not fixed based on the use of secondary metals, but that the contract as written, which provided that the Government should furnish virgin copper and spelter for the performance of the contract, bore out his intention as to what material should be used and his basis of computing the cost so that the contractor could obtain a reasonable profit. These prices were fixed on data submitted by the various reputable brass rod manufacturers, and in fixing the prices it was not contemplated that the contractor use secondary metals but that he should use the metals to be furnished by the Government.

Evidence that the contractor was to furnish secondary metals for the performance of the contract, as attempted to be introduced, is wholly inadmissible in that it seeks to vary the terms of the written contract, which required the Government to furnish the virgin copper and spelter. If this evidence may be considered, however, as

competent to show that the prices as fixed contemplated the use of secondary metals by the contractor it is wholly refuted by the testimony of Capt. Gordon.

4. It is contended that the Government knew that the claimant was using secondary metals and that the Government was anxious to conserve virgin copper. This is admitted, but the specifications did not permit the acceptance of rods made out of secondary metals, and when the Inspection Division at Washington authorized the acceptance of rods "for the present" made out of scrap it specifically stated in its letter of authorization that:

"This is not to be considered as an amendment to the above specifications."

Therefore the acceptance of rods made of the secondary metals for the time being may not be considered a waiver of the terms of the contract and specifications so as to impose liability on the Government to reimburse the claimant for the secondary metals it had purchased which were duplications of material furnished by the Government with which to complete the contract. The evidence shows that the claimant had at all times on hand a sufficient supply of virgin copper furnished by the Government with which to complete its existing contract, which it could have drawn from the common reserve fund of copper at its plant. We see no reason why the Government should be required to reimburse it for the duplication of raw materials purchased by it so that it could make greater profits when it could have completed the contract out of the materials furnished by the Government.

5. It is clear to our minds that the secondary metals the claimant purchased and which were on hand at the time of the suspension of the contract was material exceeding the requirements for completion of this contract, and was not material which complied with the specifications, and therefore the claimant is not entitled to reimbursement for such secondary metals under the provisions of the termination clause of the contract.

The decision of the Ordnance Claims Board disallowing this item is therefore affirmed.

6. Item II: Loss on excess inventory, \$40,707.19. This item, termed "Loss on excess inventory," is for the value of material on hand December 31, 1918, less the average annual inventory of materials on hand taken for three years before the war. The claimant contends that it is entitled to reimbursement for this excess inventory, because the additional stock on hand was acquired and carried by it in contemplation of fulfillment of future orders from the Government which it expected to get. It is clear that no agent of the Government authorized or instructed the claimant to pur-

chase this excess material, which was not purchased for the performance of any existing contract which claimant had obtained from the Government. Mr. Searles, assistant general manager of claimant company, frankly stated that he had expected the war to last, and that the claimant would get more contracts, and this excess material was bought in contemplation of such future contracts. We know of no ground upon which an allowance for such excess material bought in contemplation of future contracts can be made. It is admitted that this excess material was not necessary for the performance of contract No. P16700-4000A, and the termination clause of that contract permits an allowance to the contractor only of materials and component parts purchased by the contractor for the performance of the contract not exceeding the requirements for the completion of the contract.

It is, therefore, the opinion of this Board that the decision of the Ordnance Claims Board disallowing the item of claim for loss on excess inventory was correct, and we therefore affirm that decision.

7. The Board of Contract Adjustment therefore recommends to the Secretary of War that an adjustment be made with the claimant in accordance with this opinion and with the settlement previously proposed by the Ordnance Claims Board, and that a settlement contract based on such adjustment be tendered to the claimant in final settlement of its contract No. P16700-4000A.

Col. Delafield and Mr. Hendon concurring.

JUNE 23, 1920.

**Cases Nos. 2680 and 2673.**

*In re* **CLAIMS OF J. V. CRANE AND GEORGE COLEBANK.**

1. **JURISDICTION.**—When a claim under the act of March 2, 1919, is not presented to or filed with any department or officer of the Government until after June 30, 1919, there was no authority in the Secretary of War, or in the Board of Contract Adjustment, to make settlement or adjustment of said claim.
2. **CLAIM AND DECISION.**—Claims under the act of March 2, 1919, for \$2,000 and \$629, alleged balances due on wool. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. These claims arise under the act of March 2, 1919. Each claimant has filed a statement of claim, Form B, under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, the claim of J. V. Crane being for \$2,000, and the claim of George Colebank amounting to \$629.20, by reason of agreements alleged to have been entered into between claimants and the United States.

2. Each claimant has furnished the same statement of facts, the only difference in the two statements being as to the amount of wool and the amount alleged to be due each claimant. Statement of claim submitted by J. V. Crane reads in part as follows:

“On or about the first part of July, 1918, claimant entered into an agreement with an agent acting under the authority, direction, or instruction of the Secretary of War, for the purpose of selling his wool, which amounted in the aggregate to 8,600 pounds; that said wool was shipped by claimant to C. J. Mustion Commission Co. at Kansas City, Mo., Government agent; that said Government agent agreed to sell the claimant's wool on a basis of the July 30, 1917, market; that under said agreement claimant's wool was shipped as heretofore stated, and the same was stored in a warehouse at the southeast corner of South and May Streets, Kansas City, Mo., where same was to be valued by the Government valuation committee; that later C. J. Mustion Wool Commission Co. remitted to claimant by check as part payment for said wool.”

\* \* \* \* \*

“Claimant states that the Government valuation committee did not properly grade said wool, and that he did not receive the price



that was to be paid for the wool clip of 1918, as per letter from C. J. Mustion. \* \* \* That claimant is due by the Government the sum of approximately \$2,000, the said amount being the difference between the amount of said wool as it was graded and the amount that should have been paid for said wool had it been properly graded, basing this argument on the ground that had it been properly graded it would have brought around 52 cents per pound, whereas as it was graded claimant only received 27 cents per pound."

Statement of claim submitted by George Colebank is based on 4,840 pounds of wool, and shows \$629.20 due this claimant by reason of improper grading, and that he should have received 60 cents per pound whereas he received only 47 cents per pound. Otherwise his statement of claim is the same as that of J. V. Crane quoted in part above.

3. Each claimant has furnished the Board of Contract Adjustment with an affidavit showing that the first presentation of each claim made to any department, official, or agent of the Government was the presentation made to the Board of Contract Adjustment in May, 1920.

#### DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War nor by the Board of Contract Adjustment, which is in such cases the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and in so doing must comply strictly with every provision of the



act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimants having failed to present these claims before June 30, 1919 (and for nearly a year thereafter), it is clear that these claims can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 23, 1920.

**Case No. 2605.**

***In re* CLAIM OF NEW YORK CENTRAL RAILROAD CO.**

- 1. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,839.62 based upon an implied agreement relating to the construction of crossovers. By its decision of June 1, 1918, claimant was denied relief. Claimant requested a rehearing, which was granted, but no additional testimony was introduced at the rehearing. Held, on reconsideration of the record, the former decision denying relief is affirmed. For the facts, see the prior decisions of this Board, Vol. V, p. 174.

Mr. Smith writing the opinion of the Board.

**FINDINGS OF FACT, ON REHEARING.**

The Board finds the following to be the facts:

1. On June 1, 1918, this Board rendered a decision in this case denying relief to claimant. A rehearing was granted and an opportunity afforded claimant for the introduction of further testimony. No testimony, however, was introduced at the rehearing.
2. The case is here by appeal from a decision denying claimant relief, of the Claims Board, Transportation Service, on a claim for \$2,839.62, as amended, by reason of an agreement alleged to have been entered into between claimant and the United States within the meaning of the act of March 2, 1919.
3. The claim is for the cost of construction, maintenance, and estimated cost of removal of a crossover between the tracks of claimant and for one-half of the cost of construction, maintenance; and estimated cost of removal of a crossover connecting the tracks of claimant and those of the Erie Railroad Co. at Hoboken, N. J.
4. During the war, and prior to the armistice, troops from Camp Merritt were moved to Hoboken piers for transportation overseas over the lines of the West Shore Railroad Co., one of claimant's lines, the Erie Railroad Co.'s tracks, and the tracks of the Hoboken Shore Railroad. Claimant was the initial carrier. At Hoboken the troop trains passed through the Erie yards and thence onto the tracks of the Hoboken Shore Railroad, over which the trains were transported to the piers. Long trains were required to be cut in three sections, and switch engines would move the sections to the piers. There was much congestion of traffic about Hoboken; and in Sep-

tember, 1918, Mr. Benjamin Flippin, assistant chief of the Inland Traffic Service of the War Department, consulted with officials of claimant and the Erie Railroad relative to expediting troop movements from Camp Merritt. As the result of this conference Mr. Flippin, on September 21, 1918, wrote Mr. P. E. Crowley, Federal manager of the claimant, as follows:

"1. Attached is sketch of tracks suggested to be installed by the West Shore in making connection at Baldwin Avenue with the Erie, for the more expeditious handling of passenger equipment to Army Piers, Hoboken, N. J.

"2. I am informed by Capt. J. S. Langston, vice president Hoboken Shore Road, that your company has the material available for construction of this crossover, but are waiting for instructions to go ahead with the work. May I not hope that same may be forthcoming at an early date?

"3. The Erie recently installed crossings and made connection with the Hoboken Shore at junction of the Erie and Hoboken Shore at Sixteenth Street, and the proposed new connection with the West Shore would create an ideal situation in respect to purposes desired."

5. No reply to this letter was received, and on October 14, 1918, Mr. Flippin wrote Mr. Crowley again as follows:

"1. Attached is copy of my letter addressed to you September 21, to which I do not appear to have received reply.

"2. The commanding general Port of Embarkation, Troop Movement Section, has asked me if this work can not be expedited since it is their desire to handle some troops from Camp Merritt (Dumont, N. J.) by rail for unloading on the tracks of the Hoboken Shore, pointing out that this crossover is necessary to conveniently effect delivery to the Hoboken Shore."

6. By letter dated October 15, 1918, Mr. Crowley replied in part as follows:

"Replying to your letter of October 14, file 501, relative to installing crossover between our northbound and southbound tracks, and also proposed connection with the Erie at Baldwin Avenue, Weehawken.

"This work has been authorized and the material is on the ground, and we hope to have the crossover installed in the near future."

7. Thereafter and prior to October 27, 1918, the requested crossovers were constructed.

8. There is testimony in the record, pro and con, as to the advantages of these crossovers to claimant. There is also evidence that by moving the trains from Camp Merritt over the crossovers there would be a saving in the time of transportation of from one and one-half to two hours. What portion of this saving in time would be gained to claimant does not appear. There is evidence of a custom on the part of claimant that where sidetracks are installed for the benefit of industries located adjacent to trunk lines, the industries are always re-

quired to pay the cost thereof, and that it is the rule of claimant to require a contract with reference thereto before the sidetracks are installed. No custom is shown with reference to the expense of crossovers between its own tracks or as to crossovers connecting claimant's tracks with those of other railroads. There is no evidence of an express agreement, and claimant relies for recovery upon an implied agreement arising from the construction of the crossovers pursuant to the request of Mr. Flippin.

DECISION.

1. Mr. Flippin had charge of traffic and transportation matters of the War Department flowing through New York City and vicinity, and it was his duty to provide facilities, to furnish equipment for the transportation of troops, to anticipate their requirements, and to see that they were met. It was his judgment, not controverted by claimant, that the construction of the crossovers was necessary in order to expedite the movement of troops from Camp Merritt to the Hoboken piers.

2. The construction of these crossovers permitted troop trains from Camp Merritt, moving over the West Shore Railroad, to be handled to the Hoboken pier without change of engines, and in from one and one-half to two hours' less time than before the crossovers were constructed. The letter from Mr. Flippin to claimant, dated September 21, 1918, was a mere suggestion that the crossovers be constructed.

3. They were constructed entirely upon the right-of-way of claimant, and were installed for the purpose of expediting the movement of troop trains in which claimant as well as the Government was interested. While the crossovers are of little or no use to claimant in handling its commercial business, yet they were constructed without any express agreement that the Government should pay therefor, and no sufficient facts are shown to raise an implied agreement on the part of the Government to reimburse claimant for the cost thereof, or for the maintenance of the crossovers, or for the expense of their removal. The Board is of the opinion that claimant is not entitled to relief.

DISPOSITION.

1. The final order dated June 1, 1920, denying relief to claimant is hereby approved, and no additional order in this regard is deemed necessary.

Col. Delafield and Mr. Thomas concurring.

JUNE 23, 1920.

**Case No. 2749.**

*In re* **CLAIM OF A. C. MESSLER CO.**

- 1. CONSTRUCTION OF CONTRACT—ADDITIONAL MATERIAL.**—When claimant agreed to manufacture cartridge clips at \$9.85 a thousand and the Government agreed to furnish 17 pounds of copper and spelter at \$3.30 per thousand, and the specifications showed that it would require 19 pounds of material per thousand clips, it was the duty of the claimant to furnish the additional material at its own expense, and there was no obligation on the Government to do so.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$12,745.76 additional material. Held, claimant not entitled to recover.

Mr. Averill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, on a claim for \$12,745.76 on an informally executed contract.

2. On April 17, 1918, A. C. Messler Co., the claimant, entered into a contract No. P6078-1444SA with the Ordnance Department, United States Army, for the manufacture and delivery to the Government of 15,000,000 cartridge clips.

3. This contract was proxy-signed, and therefore becomes an informal contract. The contract provides that the United States will pay to the contractor \$9.85 per thousand clips, less deductions of \$3.30 per thousand clips to cover certain material which was to be furnished by the Government.

4. The contract also specifies the exact quantity of material which was to be furnished to the contractor by the Government, namely:

“Eleven and five one-hundredths pounds of copper and 5.95 pounds of spelter will be released for the contractor’s use per 1,000 clips manufactured, and the cost of same will be deducted from invoice. This amounts to \$3.30 per 1,000 clips.”

5. The contractor manufactured and delivered to the Government 15,000,000 clips and received payment for same at \$9.85 less \$3.30, a net price of \$6.55, a total of \$98,250.

6. The contractor claims that:

“On April 17, 1918, we were awarded a contract for 15,000,000 cartridge clips. According to letter from Herbert O’Leary, lieu-

tenant colonel, Ordnance Department, United States Army, and our own understanding the Government should have furnished the full amount of stock necessary to manufacture these clips. Instead of this, however, raw material was furnished as follows: 166,368 pounds copper and 89,250 pounds spelter, which represents 170,412 pounds per thousand clips. When the specifications came in they called for 19 pounds of brass per thousand, which would figure 285,000 pounds of material (without allowance for any scrap) instead of 255,618 pounds as furnished by the Government.

"We bought and paid for the difference, viz, 28,311 pounds required to complete the 15,000,000 clips, which does not include amount of material which would be naturally consumed in resultant scrap. This scrap in accordance with amendment dated March 14, 1919, as referred to in your letter of May 13, should be provided for in raw material requisition, and represents 15,000 pounds at 19<sup>7</sup>/<sub>7</sub> cents, or \$2,911.76.

"The Government inspector, Lieut. Wells, made up the invoices and mailed them each day. He states that he should have deducted \$3.30 per thousand from the price, \$9.85, only until the Government material had been used. Instead of this, however, he continued to deduct the \$3.30 per thousand until full 15,000,000 were completed.

"Therefore, for that portion of the shipments covering 1,490,053 clips, no deductions should have been made from invoices on account of raw material furnished, as this material was furnished and paid for outright by us. For such stock as was furnished by us \$3.30 per thousand should have been added to \$9.85 when invoiced instead of deducting it.

"Consequently there is still due us on the contract \$9,834 plus cost of scrap represented in raw material consumed therefor, amounting to 15,000 pounds, at 19<sup>7</sup>/<sub>7</sub> cents, or \$2,911.76, thus making our entire claim \$12,745.76."

7. By the specifications of the contract each unit consisting of 1,000 clips was to weigh 19 pounds, and of this 19 pounds the Government was to furnish claimant 17 pounds at \$3.30 per 1,000 clips.

#### DECISION.

1. The claimant's first contention is that the Government should have furnished the full amount of stock necessary to manufacture the clips. The Board can find no evidence of any such intention, either in the language of the contract or in the record. From the language of the contract it is clear that each unit of 1,000 clips was to weigh 19 pounds; that of this 19 pounds the Government was to furnish 17 pounds of component raw materials, for which a fixed sum of \$3.30 was to be paid by the contractor, the contractor being under obligation to supply any additional material required in excess of the 17 pounds at its own expense.

2. The record shows that the Government furnished 255,618 pounds of materials. This, upon the basis of 17 pounds Government material per 1,000 clips, would produce 15,035,353 completed clips.

3. It therefore appears that the Government furnished all the material required by the contract, and in fact more than was required; for at 17 pounds per 1,000 clips the 255,618 pounds would have been sufficient to manufacture 15,035,353 clips or 36,353 more than was provided for in the contract.

4. The Board is, therefore, of the opinion that the contractor is entitled to be paid at a rate of only \$6.55 per 1,000 clips for the entire 15,000,000 clips. The resulting amount \$98,250 has already been paid.

5. In view of the above, it is the opinion of the Board that there were no clips manufactured solely from material of the contractor, and consequently his claim that such clips so manufactured should be paid for at a rate of \$9.85 plus \$3.30 per 1,000 clips is without merit.

6. Relief must, therefore, be denied.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.



JUNE 24, 1920.

**Cases Nos. 2761, 2764, 2765, 2766, 2767, 2769, 2771, 2772, 2773, 2774, 2775, 2786, and 2808.**

*In re* **CLAIMS OF C. F. ROESNER; PRICE & TRAMMELL; F. E. CLAYTON; AUGUST HERRING; B. J. CLAYTON; GRIMES & COPE; E. M. JONES; PARKER & ALEXANDER; A. C. HERRING; MRS. L. R. BROOKSHIRE; WILL HALE; A. V. LIVINGSTON; G. C. RAN.**

1. **JURISDICTION.**—The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims.
2. **CLAIM AND DECISION.**—These 13 claims for varying amounts are for losses suffered by claimants due to alleged improper grading of their 1918 wool clip. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

#### FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These 13 claims arise under the act of March 2, 1919. Claimants have filed statements of claim, Form B, under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, by reason of agreements alleged to have been entered into NS-9233/MB between claimants and the United States.

2. Each claimant has stated substantially the same facts. In May and June of the year 1918 claimants delivered to commission merchants and wool dealers various amounts of wool. Each claimant's wool was delivered to one or more of four dealers. Deliveries were made to H. P. Roddie & Co., of Brady, Tex., agent of Charles J. Webb & Co., of Philadelphia, Pa.; to S. D. Ranier, of Llano, Tex., agent of Farnsworth, Stevenson & Co., of Boston, Mass.; to Caldwell Palmer, of San Antonio, Tex., agent of Jeremiah Williams & Co., of Boston, Mass., and Crowdus Bros., of Fort Worth, Tex.

3. Claimants allege that this wool was delivered for the use of the Government in accordance with the terms of the Government regulations for handling the wool clip of 1918, as established by the Wool Division, War Industries Board, May 21, 1918. These regulations provide that:

“The grower shall receive fair prices for his wool based on the Atlantic seaboard price as established on July 30, 1917, less the profit to the dealer \* \* \* and less freight to seaboard, moisture, shrinkage, and interest.”

It is alleged by claimants that they have not been paid the prices determined by the Government regulations, and that there is due them by reason of improper grading the following sums:

C. F. Roesner-----	\$520. 20
Price & Trammel-----	849. 50
F. E. Clayton-----	723. 59
August Herring-----	2, 296. 53
B. J. Clayton-----	455. 85
Grimes & Cope-----	276. 62
E. M. Jones-----	393. 68
Parker & Alexander-----	879. 70
A. C. Herring-----	1, 386. 04
Mrs. L. R. Brookshire-----	1, 572. 65
Will Hale-----	487. 11
A. V. Livingston-----	503. 52
G. C. Ran-----	294. 50

The dealer usually advanced the grower three-fourths of the grower's estimate of the wool's value. The grading in each instance failed to allow the grower the amount he had requested and in no case did he receive a sum sufficient to entirely make up the other one-fourth which he claimed was due him.

4. In view of the fact that the various statements of claim and the documents attached thereto gave no evidence that the claims had been presented to the Government prior to the filing of the claims in May or June, 1920, this Board requested each claimant to furnish evidence or information concerning a presentation of the claim to any department, official, or agent of the Government prior to the presentation made to this Board. Each claimant thereupon furnished the Board an affidavit in which it is shown that the claim was not presented to the Government prior to May, 1920.

#### DECISION.

1. It is neither necessary nor proper for the Board of Contract Adjustment to express any opinion concerning the alleged improper grading of the wool or the failure of the Government or claimants' consignees to pay claimants the amount alleged to be due, in view of the fact that these claims were not presented to the Government within the presentation period fixed by law.

2. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such

agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*“Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen.”*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore, we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. These claimants failed to present their claims to the Government before June 30, 1919 (and for nearly a year thereafter). It is clear, therefore, that the claims can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 24, 1920.

**Case No. 2470.**

*In re* **CLAIM OF RAYMOND ENGINEERING CORPORATION.**

1. **RELEASE.**—Where a supplemental agreement in settlement of a formal contract contains a general release of all demands and claims growing out of the original contract, the contractor is barred from recovery on a supplemental claim for continuing expenses accruing after execution of the release but growing out of the original contract.
2. **CLAIM AND DECISION.**—Appeal from decision of the Ordnance Claims Board disallowing claim under a validly executed contract for quadrant sights. Held, claimant is not entitled to recover.

Mr. McCandless writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Ordnance Claims Board on a claim for \$15,588.96, on a formally executed contract under the following circumstances:

2. On April 5, 1918, the Raymond Engineering Corporation entered into contract No. P-5392-535-C-Pa, calling for the manufacture of 764 quadrant sights for delivery to the Ordnance Department. On December 14, 1918, work under this contract was suspended at the request of the Government.

3. On May 16, 1919, the New York district claims board awarded the contractor the sum of \$299,378.83, less interest due on a loan made by the War Credits Board to the contractor. This award was embodied in a settlement contract dated June 3, 1919, and on that date signed by the claimant and the New York district claims board, and sent to the Ordnance Claims Board, Washington, D. C., which again audited the claim, and on October 20 the amount awarded was, by mutual consent, reduced to the extent of \$15,000.

4. By the terms of the settlement agreement of June 3 it was provided that said agreement should not become a binding obligation unless and until approved by the Ordnance Claims Board. The said agreement also provides as follows:

“1. This contract supersedes and takes the place of said original contract, which is hereby terminated, and the contractor hereby releases the United States from any and all claims of every nature

whatsoever arising out of said original contract, except that all articles or work delivered and accepted on or before the date of this contract under and in pursuance of said original contract, and not yet paid for, shall be paid for in accordance with the provisions of said original contract as if it had not been terminated.

"3. The United States shall forthwith pay to the contractor the sum of two hundred eighty-four thousand three hundred seventy-eight and 83/100 dollars (\$284,378.83), representing the amount due the contractor after deducting the amount of unrecouped advances hereinabove mentioned, less interest on sixty-seven thousand five hundred dollars (\$67,500) to the date of repayment by contractor of the sum of nine thousand dollars (\$9,000) representing partial recoupment, less interest on fifty-eight thousand five hundred dollars (\$58,500) to date of payment by the United States under this settlement, in full and final compensation for articles or work delivered, services rendered, and expenditures incurred by the contractor under the original contract and in full satisfaction of any and all claims or demands in law or in equity, which the contractor, its successors, representatives, agents, or assigns, may have growing out of or incident to said original contract; and said contractor hereby expressly agrees that such settlement, when made, shall constitute a complete determination of every question or claim, legal or equitable, liquidated or unliquidated, by or on behalf of the contractor, pertaining to or growing out of said original contract, except to the extent provided for in paragraph 1 hereof."

5. On August 18, 1919, while the above-mentioned settlement agreement was awaiting approval of the Ordnance Claims Board, the contractor filed a supplemental claim embracing rental of storehouse for storing Government property, insurance on Government property, and interest on borrowed money. This supplemental claim was filed to bring the claim for continuing overhead expense up to the date of October 15, 1919, and was necessitated by reason of the Government's failure to make prompt settlement. The district board examined this supplemental claim and granted an additional award of \$6,336.99 in a supplemental agreement under date of October 23, 1919, reciting the following:

Whereas, by mutual mistake and contrary to the intention of the parties, there was omitted from said contract of cancellation and settlement a provision for the payment to the contractor of the sum of \$6,336.99, which sum has been awarded to the contractor by the New York district claims board on account of claim for rental on storehouse, carrying charges to October 15, 1919, and insurance May to September, 1919:

Now, therefore, in consideration of the premises and of the sum of one dollar (\$1) by each of the parties hereto, to the other in hand paid, the receipt of which is hereby acknowledged, it is mutually agreed between the parties hereto that: The said contract of cancellation and settlement shall be and the same is hereby amended to the extent that the United States shall forthwith pay to the contractor the sum of six thousand three hundred thirty-six and 99/100

dollars (\$6,336.99), which sum is in addition to the amount paid under said original settlement contract, etc.

This agreement likewise required the approval of the Ordnance Claims Board to make it binding.

6. Both the agreement of June 3 and October 23 were forwarded to the Ordnance Claims Board for approval. On October 30, 1919, the Ordnance Claims Board approved the agreement of June 3. On November 20, 1919, the Ordnance Claims Board disapproved the supplemental agreement of October 23 upon the grounds that the settlement contract of June 3, approved October 30, waived all supplemental claims. Upon this point claimant has taken an appeal to the Board of Contract Adjustment.

7. On February 13, 1920, an attorney of this Board, observing that the items involved were for continuing expenses, wrote claimant as follows:

"It will be appreciated if you will file supplemental claim showing in detail just how the matter stands as of this date."

In response to the above request the contractor filed a revised claim, bringing the items of continuing overhead (1, 2, and 3) up to December 10, 1919, and added two new items (4 and 5). The revised claim in substance is as follows:

1. Rental of storehouse to Dec. 10, 1919-----	\$391. 67
2. Insurance to Dec. 10-----	858. 88
3. Interest on outside loans-----	7, 054. 60
4. Interest on Government loan to Dec. 10-----	6, 450. 58
5. (a) Labor in connection with the new Schedule A-----	766. 05
(b) Expense account in connection with new Schedule A-----	66. 68
Total -----	15, 588. 96

While certain of the above expenses still continue, nevertheless the claimant has expressed its willingness to settle the entire matter as of December 10, 1919, on which date payment was made by the Government of the sum awarded under the agreement of June 3.

8. On the hearing it developed that the members of the New York district claims board and the claimant contemplated that there would be some delay in obtaining the approval of the Ordnance Claims Board and that in so far as the New York district board was concerned said board was prepared to issue a supplemental settlement agreement to take care of continuing expenses. Upon this point Col. Reed, chairman of the New York District Claims Board, testified as follows (testimony, p. 23):

"Question. Was it your intention and agreement that he (the claimant) should receive something more than the amount specified?

"Mr. REED. Yes, sir. \* \* \* The understanding was that he would be paid these items of continuing expenses which were out



of pocket expenses, which he could not escape, and which he made for the account of the Government, and on account of the Government having his money and the plant tied up from the dates to which that has been allowed in the original claim until the obligation on the part of the Government was quieted by payment of the money to him and the removal of the Government's property."

9. In connection with item No. 4 for interest on the money loaned the contractor by the War Credits Board, the president of claimant company states that the rate of interest was changing from time to time and he did not include this item in his original claim because he expected to submit it in a supplemental claim when the full amount charged by the Government should be definitely known; that this amount was not known until December 10, 1919, when it was deducted from the payment made under the settlement agreement of June 3. Col. Reed stated that he does not recall whether or not this item was brought to the attention of the district board. In this connection it should be noted, however, that the settlement agreement expressly provides that the award shall be \$284,378.83, less interest on the Government loan.

10. Item No. 5 represents expenditures which it is claimed were incurred in assisting the Government with the preparation of a schedule of property used in the performance of contract P-5392-535-C-Pa. This item was not contemplated and had not accrued at the time the settlement agreement of June 3 was signed.

#### DECISION.

1. The question before this Board is whether or not the claimant is now precluded from recovering the items set forth in the revised petition of December 16, 1919, by reason of the general release contained in the agreement of June 3, 1919.

2. Although the settlement agreement under date of June 3 was signed by both the New York district claims board and the Raymond Engineering Corporation, it was, prior to October 30, merely an offer of settlement, for the reason that prior to that date it had not received the approval of the Claims Board, Ordnance Department, as required by clause 8 of article 14, which reads:

"This agreement shall not become a valid and binding obligation of the United States unless and until the approval of the Claims Board of the Ordnance Department has been noted at the end of this instrument."

3. Prior to October 30, the claimant forwarded to the Ordnance Claims Board an instrument under date of October 22, likewise signed by the New York district office and the Raymond Engineering Corporation, which instrument contained certain additional items



that the claimant wished added to its offer of June 3, thereby increasing the amount to be paid by the Government in settlement.

4. On October 30 the Ordnance Claims Board signed the instrument under date of June 3 and shortly thereafter refused to sign the instrument of October 22. The claimants were informed of the action of the Ordnance Claims Board in relation to both instruments.

5. On or about December 10, 1919, the Government tendered to the claimant the sum provided by the instrument of June 3. The claimant accepted this sum when tendered. The purposes for which it was tendered are set out in the instrument itself which reads, in part, as follows:

“In full and final compensation for articles of work delivered, services rendered, and expenditures incurred by the contractor under the original contract, and in full satisfaction of any and all claims or demands in law or in equity which the contractor, its successors, representatives, agents or assigns, may have growing out of or incident to said original contract; and said contractor hereby expressly agrees that such settlement when made shall constitute a complete determination of every question or claim, legal or equitable, liquidated or unliquidated, by or on behalf of the contractor, pertaining to or growing out of said original contract, except to the extent provided for in paragraph 1 hereof.”

6. Whatever may have been the claimant's rights prior to December 10, 1919, the fact remains that on that day the Government offered and the claimant accepted the amount agreed upon in the settlement agreement of June 3. The payment was offered by the Government upon the terms contained in said instrument and the payment was accepted by the claimant with full knowledge that the Ordnance Claims Board had refused to allow the items contained in the instrument of October 22. The claimant is bound by the terms of the general release contained in the settlement agreement of June 3. These terms are not ambiguous and bar the items for which claim is here made.

7. The decision of the Ordnance Claims Board denying relief is hereby affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 24, 1920.

Case No. 1664.

*In re* CLAIM OF R. U. V. CO.

1. **GRATUITOUS SERVICES.**—In order to recover for expenditures or services under the act of March 2, 1919, there must be an agreement, either express or implied, and there can be no recovery for services gratuitously rendered and for which no compensation was expected.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$15,458.24. Held, claimant not entitled to recover.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$15,458.24 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. A hearing has been had, at which the claimant was represented by W. T. P. Hollingsworth, its president.

3. The testimony developed absolutely no agreement between the claimant company and any officer or agent, either of the Secretary of War or of the President.

4. The testimony of Mr. Hollingsworth and of Col. Edgar S. Gorrell, United States Army, shows that, commencing about July, 1917, Mr. Hollingsworth, who appears to be a man of large affairs, was in Paris; that by reason of an experience extending over 10 years he had developed a large acquaintance among French scientists and engineers; that Col. Gorrell was with the Technical Section, American Expeditionary Forces, and a part of his duty was to obtain all information available as to the "dope" or varnish used upon wings of airplanes. Col. Gorrell became acquainted with Mr. Hollingsworth, and through Mr. Hollingsworth was introduced to many eminent technical experts. The information gathered by the aid of Mr. Hollingsworth was later brought to the United States through the agency of Mr. Hollingsworth and placed in the hands of the Bureau of Aircraft Production. Mr. Hollingsworth states that at no time did he contemplate entering into contractual relations with

the Government for the services which he was rendering; that he did not expect any compensation for same, and that he was not acting on behalf of the claimant company.

5. It further appears from the evidence that in October, 1917, Mr. Hollingsworth came from France to the United States on business connected with some of his enterprises, and that upon the arrival of his secretary (who followed him from Paris somewhat later), bringing with her confidential data, Mr. Hollingsworth called upon Gen. Squier, of the Signal Corps in Washington, and laid before this officer the data then in hand. This data was principally in connection with the possibility of developing and manufacturing in the United States a less expensive varnish for use upon the wings of airplanes, known as the "Acellos process." At this conference Mr. Hollingsworth suggested to the representative of the Government that a Dr. Helbronner, a noted scientist in Paris, could be brought to the United States by him to lay before the committee further information in connection with the development of the proposed cheaper type of varnish. He alleges he was told that the committee would be pleased to talk with Dr. Helbronner and thereupon Mr. Hollingsworth arranged for Dr. Helbronner to come to the United States and personally paid the expense incident to this trip. Mr. Hollingsworth testified that nothing was said in connection with any compensation or any payment of expenses incident to the trip; that at the time he himself did not contemplate being reimbursed directly for same.

6. Mr. Hollingsworth testified that as president of the R. U. V. Co. he received no salary; that the company is not indebted to him for any of the items or expenditures made by him as set out in the claim.

7. The proposed process for manufacturing dope or varnish was not adopted by the Government, and at no time did the negotiations reach a stage where contractual relations were considered.

8. It was clearly established that at no time was there any intention on the part of the Government or of the claimant company to enter into any agreement, either express or implied, obligating the Government to reimburse the claimant company for any expenditures. As a matter of fact, the claimant company has made no expenditures.

9. It was suggested that probably the claim should have been filed on behalf of Mr. W. T. P. Hollingsworth, but even if this were done, there would be no evidence to support any agreement, either express or implied.

10. If the claim is to be considered as one for services rendered, and for which services there arises an implied agreement obligating

the Government to compensate Mr. Hollingsworth for said services, then the evidence of the claimant negatives any such implied agreement, as he positively states that at no time did he contemplate any compensation for such services as he may have rendered, and that it was not until 1919 when in South America he received a telegram from the R. U. V. Co. requesting that he forward a statement of his expenses; that he never considered his services as being anything but gratuitously rendered.

DECISION.

1. While it is true that Mr. Hollingsworth was undoubtedly instrumental in assisting the officers of the Technical Section of the American Expeditionary Forces in Paris, yet it is also true that at no time did either the officers or Mr. Hollingsworth consider such services except as services which were being rendered gratuitously in the interest of the country, and such as a citizen of America would be proud to render to officers of his Government in a foreign land.

2. For the reasons *supra*, the Board is of the opinion that no agreement, either express or implied, within the purview of the act of March 2, 1919, was entered into between either the R. U. V. Co. or W. T. P. Hollingsworth and any officer or agent of the Secretary of War or of the President, as prescribed by the act of March 2, 1919.

3. Relief must, therefore, be denied.

DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Mr. Hopkins concurring.

JUNE 24, 1920.

**Case No. 2783.**

*In re* **CLAIM OF ATLANTIC COAST LINE RAILROAD CO.**

1. **NO AGREEMENT.**—Where claimant constructed a railroad track on its own right of way, under an agreement with a civic organization which failed to bear its agreed portion of the expense, and there was no agreement, express or implied, on the part of any authorized agent of the Secretary of War, or of the President, there is no obligation on the Government to pay therefor, although the track was used exclusively for Government purposes and claimant derived no revenue therefrom.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$40,512.80 for track construction. Held, claimant not entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Transportation Service Claims Board, War Department, on a claim for \$40,512.80, on an informally executed contract. The case was submitted on the record supplemented by the statement of Mr. Milton C. Elliott, counsel representing the claimant.

2. A review of the facts shows that the telegram dated December 1, 1917, addressed to Mr. Lyman Delano, vice president of the claimant company, and signed by Mr. Ed. Scott, representing the Commercial Club, of Arcadia, Fla., and the two telegrams of that date interchanged between Mr. Lyman Delano and "Saltzman, by Benton, Traffic Branch, Signal Corps," do not establish an agreement within the terms of the Dent Act.

3. The record, as amplified by counsel, further shows that the trackage in question was constructed as a result of a conference between the representatives of the "Commercial Club, Arcadia, Fla.," and of the claimant company.

**DECISION.**

1. A review of all of the evidence shows that the track in question was not constructed as a result of an agreement, express or implied, entered into by any officer or agent acting under the authority, direction, or instruction of the Secretary of War, and that the claim therefore does not fall within the provisions of the act of March 2, 1919.

**DISPOSITION.**

1. A final order denying relief will issue.  
Col. Delafield and Mr. Price concurring.

JUNE 24, 1920.

Case No. 2742.

*In re* CLAIM OF WILLIAM WHITMAN CO. (INC.).

1. **EXPENSE FOR SAMPLES.**—Where the contract provided that all materials furnished thereunder before being accepted should be subject to a rigid inspection, and specified the manner of inspection and sampling, which destroyed or consumed the sample, the loss must be borne by the contractor.
2. **CLAIM AND DECISION.**—Claim under General Orders, 103, on formal contracts for cost of samples. Held, claimant not entitled to recover.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Air Service, on a claim for \$5,735.15 arising out of formally executed contracts under the following circumstances:

2. The claimant had five formally executed contracts with the Bureau of Aircraft Production, ranging in date from October 11, 1917, to July 26, 1918, inclusive, for the manufacture of airplane fabric, and the aggregate amount of goods embraced in the order and contracts was 3,215,000 yards of airplane fabric.

3. The claim of William Whitman Co. (Inc.), the claimant, is for airplane fabric delivered under the foregoing five contracts and which it alleges was consumed by the Government for technical tests and "for which material the William Whitman Co. (Inc.) has not yet been paid, notwithstanding it has fulfilled its part of the contract obligations."

4. The following statement sets forth the contracts and orders, the yards of material consumed in technical tests under each contract, and the amount of its claim:

Order.	Contract.	Yards.	Price.	Amount.
No. 37.....	2783	4,034	\$0.60	\$2,420.40
No. 212.....	3693	3,300½	.62½	2,062.81
No. 20075.....		702	.57½	403.65
No. 20261.....	2237	1,353½	.60	811.95
No. 710078.....	4389	38½	.95	36.34
Total.....		9,428		5,735.15

5. Article III of all the contracts reads as follows:

"All supplies and materials furnished and work done under this contract shall, *before being accepted*, be subject to a rigid inspection by an inspector appointed on the part of the Government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Chief Signal Officer, United States Army, as to *quality and quantity shall be final*."

6. Specifications No. 16004-A, which were made a part of all the contracts, provides in part as follows:

"Samples for tests shall be taken from at least five (5) bolts in each warp woven.

"The samples taken from a bolt shall be one (1) yard long and the full width of the bolt; it shall be cut from the fabric at a point ten (10) yards from the end of the bolt.

"Test specimens for tensile tests, 12 inches long and 1½ inches wide, shall be cut from each sample taken as shown in figure 1. Threads shall be pulled out from the sides of the test specimens until a width of one (1) inch of woven fabric remains.

"The Signal Corps inspector shall mark all accepted material close to the end of each bolt with the official acceptance stamp. Rejected material shall be marked with the rejected stamp and shall not be resubmitted without the express consent of the Signal Corps. The acceptance and rejection stamps shall be so placed that they do not injure the material, or, in the case of rejected fabric, so that the marking does not preclude the use of the material for other than Government work.

"The inspector shall at all times have free access to all parts of the mills which concern the manufacture of fabric ordered to this specification and shall be afforded every facility to satisfy himself that the fabric is in accordance with this specification.

"All fabric that does not conform to this specification shall be rejected and shall be replaced by the manufacturer at his expense."

7. In the inspection of the cloth furnished on the foregoing contracts according to specifications provided in Article III of the contracts, there was consumed 9,428 yards for which the claimant is now asking compensation.

8. The claimant's contention is as follows:

"We contend that there was no provision in these orders that the cloth tests should be used without compensation to the owner, which in this case was the contractor. We also contend that from the nature of the raw materials used—this raw materials was sea island-cotton of 1½ inch staple and was supplied by the Government, that the fabric would stand the Government tests as set forth in the specifications.

"We also contend that from the mechanical character of the manufacture of the cloth and from tests made by ourselves at the mill from time to time that we, as contractors, were reasonably certain that we were supplying the identical fabric sold to the Government and that that fabric could stand the test set forth in the specifications."



## DECISION.

1. The language of the contracts clearly sets out what was required of the contractor. It provides that all supplies and materials furnished and work done under this contract shall, *before being accepted, be subject to a rigid inspection* by an inspector appointed on the part of the Government. The specifications, which were made a part of the contract, set forth explicitly how the tests were to be made. The contracts assured to the Government the right to inspect in the manner prescribed the total yardage tendered by the contractor. The contracts also required the contractor to furnish the Government with 3,215,000 yards of cloth. The test prescribed contemplated the destruction of a certain proportion of the goods and was clearly a condition precedent to the passing of title in the goods.

2. The burden was on the contractor to place in a deliverable state 3,215,000 yards of cloth, and under the express terms of the contract the goods could not be put in a deliverable state until they had passed the tests prescribed.

"Where there is a sufficient agreement for an inspection of the goods, such stipulation becomes a condition precedent which must be complied with before there can be a sufficient performance of the contract to bind the purchaser." (35 Cyc., pp. 226-227.)

"If under a contract for the sale of specific goods the seller is bound to do something to the goods for the purpose of putting them in a deliverable state; that is, into a condition in which the buyer is bound to accept them, unless a different intention appears, the property does not pass until such thing is done." (35 Cyc., p. 282.)

"The necessity for weighing, measuring, or testing the goods may be either for the purpose of ascertaining the price to be paid or for the purpose of identifying the goods or ascertaining their quantity or *quality*, and in the cases of the latter character the general rule also applies *that title does not pass until such acts are done*. Cases in which an inspection for the purpose of determining the quality of the goods is provided for are within the application of the rule; *that if any act remains to be done in relation to the goods the property does not pass*." (35 Cyc., p. 288.)

3. It is clear that the testing of the goods was a condition precedent to the passing of title to the goods. Had the contract read that all supplies and materials furnished and work done under this contract shall be subject to a rigid inspection by the Government, then there might have been some ambiguity; but the contract reads, "all supplies and materials furnished and work done under this contract shall, *before being accepted*, be subject to a rigid inspection by an inspector appointed on the part of the Government."

4. It is therefore clear that the inspection and the consequent inevitable destruction of a portion of the goods was provided for by the express terms of the contract.

5. It is not alleged that an unreasonable amount of the goods was consumed in the testing of the fabric. On the contrary, the evidence shows beyond a shadow of doubt that in making the tests the Government did not exercise its full right and consume all of the yardage provided for in the specifications made part of the contract, but in many instances did not consume the yardage specified in the contract.

6. Under the express provision of the contract the goods would not be put in a deliverable state until they had been subject to the tests prescribed, and the known loss incident to putting goods through the test was a part of the expense to be borne by the contractor in order to put the goods in a deliverable state, and title did not pass until after this was done.

7. For the reasons *supra*, the Board is of the opinion that relief must be denied and the decision of the Claims Board, Air Service, must be affirmed.

8. Relief is therefore denied.

DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.

JUNE 24, 1920.

**Case No. 2784.**

*In re* **CLAIM OF ATCHISON, TOPEKA & SANTA FE RAILWAY CO.**

- 1. FACILITIES—COMMON CARRIER—NO IMPLIED AGREEMENT.**—There can be no agreement implied under the act of March 2, 1919, to compensate claimant for the installation of facilities which it was obligated to install in order to properly operate as a common carrier.
- 2. CLAIM AND DECISION.**—This claim for \$903.69 arises under the act of March 2, 1919, and is an appeal from the decision of the Claims Board, Transportation Service, disallowing claim for installation of facilities. Held, claimant is not entitled to relief.

Mr. Averill writing the opinion of the Board.

This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$903.69, upon an alleged implied agreement arising under the act of March 2, 1919. Statement of claim, Form B, has been filed.

A hearing has been had at which claimant was represented by counsel.

The Board finds the following to be the facts:

1. The claim was first filed with the Transportation Service of the War Department on June 30, 1919.

2. On August 31, 1917, Maj. Charles H. Miller, constructing quartermaster, Camp Cody, N. Mex., wrote claimant company in connection with facilities for entraining tracks at the camp and stated:

“It will be necessary to have water, gas, coal, and ice, and you should arrange to build the necessary facilities. The Government will have a line of water pipe coming into that territory and can supply the water, you to provide for the distributing line.”

3. On September 14, 1917, the same officer again wrote claimant company in connection with facilities for entraining troops and used the following language:

“The railways will be permitted to tap 6-inch Government main which crosses tracks on the leased property of the Southern Pacific approximately 5 feet east of the extreme easterly limit of the proposed line for watering cars and have service from the Government water supply. The railways will furnish all necessary labor and material for installation of pipe lines and connections.”

4. The Atchison, Topeka & Santa Fe Railway Co. constructed the pipe line and alleged that there was expended in said construction the

sum of \$903.69, for which claim is filed under the act of March 2, 1919.

5. The record shows that the pipe line so constructed was for the purpose of supplying water to the trains carrying troops from Camp Cody.

DECISION.

1. There is no evidence of any express agreement having been entered into between the claimant company and the Government which in any way contemplated any obligation on the part of the Government for any of the cost pertaining to the construction of the said pipe line.

2. The Board must, therefore, look to all the surrounding facts and circumstances to ascertain therefrom whether any implied agreement obligating the Government to pay for said facilities arose.

3. The record discloses the fact that the claimant company was a common carrier engaged in the transportation of passengers and freight for hire. As such common carrier it was its duty to provide an adequate supply of drinking water for passengers carried upon its trains, whether said passengers were soldiers in the service of the United States Government or whether they were civilians.

4. The letters from the constructing quartermaster of the camp, upon which the claimant relies, do not indicate any intention upon the part of the Government to pay for the construction of the pipe line. Said letters simply call the attention of the claimant company to the fact that an adequate supply of water was necessary and offer to permit the claimant company to draw its water supply from a Government main.

5. There is evidence that the water pipe line was built on the railway right of way, but this point in the view taken is immaterial.

6. It being clear that it was the duty of the railway company to provide water for its trains, no implied agreement can arise obligating the Government to reimburse claimant for any money expended in doing that which it was legally bound to do.

7. For the reasons, *supra*, the Board is of the opinion that no agreement, either express or implied, within the purview of the act of March 2, 1919, was entered into obligating the Government to reimburse the claimant for any portion of the expenditures alleged.

8. Relief must, therefore, be denied and the decision of the Claims Board, Transportation Service, is hereby affirmed.

DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.

JUNE 24, 1920.

**Case No. 2787.**

*In re* **CLAIM OF ATCHISON, TOPEKA & SANTA FE RAILWAY CO.**

1. **NECESSARY CONSTRUCTION—NO IMPLIED AGREEMENT.**—No contract can be implied under the act of March 2, 1919, to compensate claimant for building a drain that it was legally bound to do under the circumstances under which it was constructed.
2. **CLAIM AND DECISION.**—This claim for \$888.29 is an appeal from the Claims Board, Transportation Service, arising under the act of March 2, 1919, on an alleged implied agreement. Held, claimant is not entitled to relief.

Mr. Averill writing the opinion of the Board.

This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$888.29 arising under the act of March 2, 1919. Statement of claim, Form B, has been filed.

A hearing has been had at which hearing the claimant was represented by counsel.

The Board finds the following to be the facts:

1. It appears from the record that some date prior to November 9, 1917, and for the emergency created by the war with the Imperial German Government, the United States Government located a camp known as Camp Cody at Deming, N. Mex., said camp being located upon land leased by the Government; adjoining this land was a roundhouse the property of the Atchison, Topeka & Santa Fe Ry. Co.

2. In the operation of a roundhouse a considerable volume of water is wasted from the stand pipes for supplying water to locomotives and other purposes in connection with the operation of said roundhouse, which said waste water carries with it grease and wastage of a more or less objectionable character.

3. The drainage from said roundhouse ran over and upon a portion of the land in the control of the Government and said drainage was objectionable to the Government and the claimant company was requested to so arrange the facilities in and about its roundhouse as to prevent the said drainage from interfering with the purposes for which the Government had acquired the use of the adjoining property.

4. In order to accomplish this object the railway company constructed a sump into which the drainage from its roundhouse was

directed and in so doing incurred an expense of \$888.29, for which this claim has been filed.

DECISION.

1. The record discloses no evidence whatever of any express agreement or any intention on the part of the Government to reimburse claimant for expenditures made.

2. It was clearly the duty of the railway company to so conduct the operations of its roundhouse and to so confine the water and drainage arising from such operations as not to interfere with or disturb the quiet possession of adjoining property. If the drainage from the said roundhouse interfered with the enjoyment of adjoining property by the tenant thereof, it became the legal duty of the railway company to so direct or confine the said drainage as not to interfere with or disturb the tenant upon the adjoining property, and if in performance of said duty it became necessary for the claimant company to incur expenses in connection with performing its said duty, no agreement could arise from the performance of such duty obligating the lessee of the adjoining property to reimburse or compensate the claimant for expenses so incurred.

3. For the reasons *supra*, the Board is of the opinion that no agreement, either express or implied, within the purview of the act of March 2, 1919, arose obligating the Government to compensate the claimant company for any part of the expenses incurred.

4. Relief must, therefore, be denied, and the decision of the Claims Board, Transportation Service, is hereby affirmed.

DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.

JUNE 24, 1920.

**Case No. 246.**

***In re* CLAIM OF FARRAGUT TEXTILE MANUFACTURING CO. (RECONSIDERATION).**

**NOTE.**—This case upon rehearing was reversed in accordance with the request of the special member of the War Department Claims Board as contained in the memorandum to this Board. By the recent decision the Board follows the law announced in the case of the Specialty Knit Goods Manufacturing Co., No. 341, decided on June 21, 1920. The facts in the case will be found in printed volume No. 2 of the Decisions, page 95.

Mr. Eaton writing the opinion of the Board.

**DECISION.**

1. The facts on which the decision is based are sufficiently stated in the decision of this Board rendered June 4, 1920, and the findings of fact there stated are referred to as the facts on which the present decision is based.

2. The record shows that this claim arises under the act of March 2, 1919, and that there was a hearing before this Board on September 19, 1919, and another hearing took place on March 30, 1920. In the decision of June 4, 1920, it was held that the claimant was entitled to relief. On the same date certificate Form C was executed and a document signed setting forth the nature, terms, and conditions of the agreement that was found to have been entered into between the claimant and the United States. The claim was then sent to the Claims Board, Director of Purchase, for action. The claim was returned to this Board for reconsideration by the special member of the War Department Claims Board assigned to Purchase.

3. In the memorandum of transmittal to this Board under date of June 15, 1920, is contained the following:

“It is therefore requested that the opinion in the Farragut case be reconsidered, set aside, and vacated, and that notice of final action be promptly given to the Claims Board, Office Director of Purchase.”

4. In accordance with the request of the special member of the War Department Claims Board as contained in the memorandum to this Board, we have examined the record and the testimony and have reconsidered our opinion, and have come to the conclusion that



the claimant is not entitled to relief. The facts in this case are not dissimilar from those found in the claim of the Specialty Knit Goods Manufacturing Co., numbered 341 on our docket, except that in the present case there is no evidence of any delinquency on the part of the claimant, and its inability to use its yarn for the Government contract to which it had been allotted was due to the action of the United States in suspending its contracts with the prime contractor. It is incumbent on us to follow the precedent of our decision in the claim of the Specialty Knit Goods Manufacturing Co., and for that reason relief will be denied this claimant, and our former opinion "reconsidered, set aside, and vacated," as suggested in the quoted memorandum of June 18, 1920.

DISPOSITION.

Final order will be entered denying the claimant relief, and notice of this action will be promptly given to the Claims Board, Office of Director of Purchase.

Col. Delafield concurring.

JUNE 25, 1920.

Case No. 2655.

*In re* CLAIM OF SEABOARD AIR LINE R. R. FEDERAL ADMINISTRATION.

1. **RAILROAD FACILITIES.**—Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks or railway station on its own right of way for the purpose of supplying a Government camp with proper railroad facilities. Nor is such an obligation to be implied from a request by a Government officer to lay a frog and switch on its main line for the same purpose.
2. **CLAIM AND DECISION.**—Appeal from the decision of the Transportation Claims Board denying relief on a claim for \$9,875.57 filed under the act of March 2, 1919, based upon an alleged implied agreement in relation to the construction of tracks and station at Dentsville, S. C. Decision affirmed.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

This is an appeal from the decision of the Claims Board, Transportation Service, on a claim for \$9,875.57, under an alleged implied contract.

1. The following is taken from claimant's petition:

"1. \* \* \* Col. William Cooper \* \* \* requested the installation of frog and switch at Dentsville, S. C., to connect with track serving camp, and to protect the situation and better enable the railroad to handle labor trains, which it was required to operate from Columbia, S. C., passenger station, a distance of approximately eight miles, a double-end storage track, in the vicinity of connection with main track was constructed, together with a small building with umbrella shed on either end on west side of track for the purpose of opening a station for the convenience of the camp people. These latter facilities were also furnished at the request of Lieut. Col. William Cooper.

\* \* \* \* \*

"4. \* \* \* The understanding had with Lieut. Col. William Cooper \* \* \* did not provide for payment by the Government to the Seaboard Air Line Railroad the cost of construction, or maintenance of the facilities above described, all of which were on the right of way of the railroad."

2. On September 3, 1918, the Seaboard Air Line, through Mr. P. G. Walton, division superintendent, was requested by Col. William

Cooper, constructing quartermaster at the Government camp, Dentsville, S. C., to lay a frog and switch on its main line right of way, in order that the Government might connect up a spur track which was being constructed by the Government into said camp. On September 4, 1918, the frog and switch was laid by the Seaboard Air Line on its main line right of way as requested. The Government contractor then connected up the spur and said frog and switch was thereafter used in connection with the transportation of men and materials required for the completion of the Government spur and also in connection with freight and passenger service to and from the Government camp.

3. The Seaboard Air Line was not requested by Col. Cooper or any other authorized Government agent to construct the storage track or the station for which claim is made. The track and the station were, however, constructed by the Seaboard Air Line for the purpose of supplying the Government camp with proper railroad facilities. The construction was wholly upon the railroad right of way.

#### DECISION.

1. This claim is within the provisions of the act of March 2, 1919.

2. There was no express agreement upon the part of the Government to pay for the construction which is the subject of this claim.

3. In view of the purposes for which the construction in question was made, the advantages accruing to the railroad, as well as the Government, prospective profits to be derived from increased business, and the custom of railroads, we find that no implied agreement on the part of the Government to pay for this construction arose.

4. The decision of the Transportation Claims Board denying relief is affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 25, 1920.

**Case No. 1702.**

*In re* **CLAIM OF THE CHESAPEAKE & POTOMAC TELEPHONE CO.**

- 1. ADDITIONAL FACILITIES—INSTALLATION CHARGE BY PUBLIC UTILITY.**—Where, in order to meet the increased demands for telephone service in the War Department, claimant installed increased facilities without any express agreement as to compensation but in the expectation of obtaining reimbursement through regular service charges and rentals, there is no implied agreement obligating the Government to reimburse claimant the cost of such installation which was not so absorbed on account of the intervention of the armistice.
- 2. SAME—CUSTOMARY CHARGE—PREVIOUS DEALINGS—NATURE OF EQUIPMENT.**—Under the above circumstances an alleged custom to charge for temporary installations such as the installation of equipment for the War Department proved to be—a practice alleged to be generally approved by public service commissions—does not overcome a presumption arising from the previous course of dealings of the parties that no installation charge would be made. Nor can an obligation be implied from the fact that the equipment was unusual, being a “central office” equipment instead of a private branch exchange such as is usually installed by telephone companies.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$98,142, based upon an implied agreement in relation to the installation of a telephone branch exchange. Held, claimant is not entitled to relief.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$98,142, by reason of agreements alleged to have been entered into between the claimant and the United States.

2. The Chesapeake & Potomac Telephone Co., which furnishes the city of Washington with telephone service, was operating a private branch exchange in 1917 located in the State, War and Navy Building.

The increase after March, 1917, in the War Department was so rapid and so great that, although the facilities of the telephone company were very substantially enlarged, they were found inadequate to meet the needs of the department.

Mr. A. D. Scovel had been appointed director of telephones of the War Department in 1917.

It was decided to erect a concrete building at 1723 F Street and to have installed there an exchange which should be large enough to take care of the requirements of the War Department. The building was built and paid for by the United States. The telephone equipment was purchased and installed by the telephone company.

3. The equipment in the new building is different in type from that which had been in use previously. It is the "regular central office equipment with a multiple switchboard" and it has its own power plant in the building. Nine thousand six hundred stations are provided for on the new switchboard. In the former location in the State, War and Navy Building the maximum number of stations was about 2,000. The plans called for 25 sections with 75 positions. The installation of 15 sections was completed and they were connected for use on June 30, 1918. The cost of this installation was met by the telephone company before August 1, 1918. On the latter date the United States took over the control and operation of the telephones of the country by virtue of an act of Congress, and the Postmaster General became United States Director of Telephones. On August 1, 1919, the United States returned the telephones to their owners. By September, 1918, the 10 remaining sections had been installed. From September, 1918, until some time after the armistice the entire equipment of 25 sections with its 75 positions was in use. Beginning about the first of January, 1919, the requirements of the War Department for telephone service gradually diminished and certain sections were discontinued from time to time. On April 30, 1920, at a hearing of the claim before this Board it was stated by the claimant that out of the total of 25 sections 17 had been discontinued and that arrangements had been made with the War Department for the permanent use of 8 sections which would accommodate at least 2,400 stations. At a later hearing on June 18, 1920, it appeared that negotiations were in progress for the discontinuing of the remaining 8 sections and for the use by the War Department of the Navy Department switchboard. Since that hearing we have been informed that the use of the F Street building is to be continued at least for some time.

4. The claim of the telephone company as made at the hearing of April 30, 1920, was based on the continuation in use permanently of 8 out of the 25 sections. The total cost of the new equipment including materials, labor, interest on expenditures during construction, etc., was given as \$410,741.66. It was assumed that the use of eight sections would be continued. The claim is for reimbursement for the loss on the discontinued 17 sections. The claimant's

figures are based on seventeen twenty-fifths of the cost of the new equipment, less the proceeds of the sale of the material for the 17 discontinued sections, which results in a claim for \$98,142. The telephone company now asks leave to amend its claim and increase its figures in case it is decided to discontinue the use of the remaining eight sections.

5. Formal contracts were entered into between the telephone company and the United States under date of September 25, 1918, which provided for the rates to be paid by the Government for telephone service. Item 20000, paragraph (c) of this contract reads as follows:

"(c) Telephone stations, includes wiring to connect stations with private branch exchange switchboards or subswitchboards, except when the installation is exceptionally expensive, due to unusual conditions, such as reinforced concrete buildings, etc., or when the system is not likely to be reasonably permanent, in which cases an installation charge will be made."

The evidence shows that this provision is one that is frequently inserted in telephone service contracts, and is in accordance with the provisions of the tariff for telephone companies established by the Public Service Commission of the District of Columbia. The contract was between the claimant and the Treasury Department of the United States. Negotiations as to this contract were had in April or May, 1918, but no mention was made in any of these negotiations of any reimbursement to the telephone company for the cost of procuring or installing the equipment for the new building. It is not claimed by the telephone company that the quoted provision of the formal contract is intended to deal with the matter of its claim in the present proceedings.

6. The opinion of the Judge Advocate General was requested as to whether the quoted provision of the formal contract of September 25, 1918, gave rise to an obligation on the part of the United States on the ground that the use of the equipment in the new building was not "reasonably permanent." His decision is that the contract was not intended to deal with that matter, and with that decision this Board is in accord. He closes his opinion as follows:

"The claim of the company can not be supported by any provision contained in the formal contract of September 25, 1918. If the company has a claim at all it must rest on an express or implied agreement, made at the time its services were requested, to the effect that the Government would reimburse it for its necessary expenditures in furnishing the requested and required facilities. Such agreements entered into in good faith during the present emergency and prior to November 12, 1918, may be equitably adjusted under the provisions of the Dent Act. The claim in its present form of an installation charge can not be legally entertained, but this office

recommends that the papers be referred to the Board of Contract Adjustment for consideration and disposition, in accordance with the views herein expressed. In any event this office should not be understood as expressing any opinion as to whether a valid claim exists or as to the amount of it, if one does exist."

7. The Secretary of War, under date of July 28, 1919, referred the claim to this Board in the following memorandum:

"WAR DEPARTMENT, *July 28, 1919.*

"Respectfully referred to the Board of Contract Adjustment for consideration and disposition, in accordance with the views of the Acting Judge Advocate General, as expressed in the last paragraph of his indorsement dated July 25, 1919.

"All papers connected with this bill of the Chesapeake & Potomac Telephone Co. are herewith.

"NEWTON D. BAKER,  
"Secretary of War."

8. Mr. Scovel was in frequent consultation with the engineers of the telephone company in relation to the kind of equipment that should be obtained for the new building. His approval was secured before the new facilities were installed. He testified that his immediate superior was the Secretary of War. His testimony as to the payment of the cost of the equipment is as follows, after stating that he talked with Mr. Claggett, of the telephone company; with Mr. Scofield, Assistant Secretary and Chief Clerk of the War Department; and with Mr. Drane, Chief of the Supply Division:

"Mr. EATON. Do you remember what was said at that time?

"Mr. SCOVEL. There was nothing ever definitely said. Mr. Scofield says, 'It is going to cost a lot of money,' and I said, 'Yes.' And he says, 'Who is going to pay for this?' I said, 'I expect the Government will have to,' and that was the way it was left.

"Mr. EATON. I assume you know nothing of the details of the actual cost of the installation?

"Mr. SCOVEL. Absolutely none. I heard them at the conferences, but I was interested more in providing the actual facilities that were necessary rather than the cost.

"Mr. EATON. After the system had been installed and was in operation, did you then confer with any of the officers of the telephone company?

"Mr. SCOVEL. Except for similar conversations.

"Mr. EATON. Did you ever say anything to the Secretary of War?

"Mr. SCOVEL. He was over at the building one day with me, and he made some remark about, 'This will cost a lot.' I said, 'Well, Mr. Secretary, do you realize this thing here has cost us nearly half a million dollars?' He says, 'You don't say so,' and he says, 'That is costing enough.' I said, 'I know, but if the war keeps on we will have to put on another station, I am afraid,' and I am frank to say there was nothing definite said."



9. Mr. Claggett testified that in March or April, 1918, after the work of installation had been going on for some months, but before it was completed, he told Mr. Scofield that if the use of this equipment was temporary only the Government would be expected to pay for the cost of it, and that Mr. Scofield made no answer to that statement. He also stated that if the equipment in the new building continued to be used it was not intended that any charge would be made for its cost or for the cost of installation.

DECISION.

1. The question before us is as to whether or not an express or implied agreement was entered into between the United States and the telephone company within the scope of the provisions of the act of March 2, 1919. As has been stated, neither the United States nor the telephone company intended the service contract of September 25, 1918, to deal with the question of reimbursement for the cost of the installation of equipment in the new building.

2. The evidence of anything that may be called an agreement or understanding as to the terms under which any reimbursement should be made the telephone company for any of its costs for the procuring and installing of new equipment in the F Street building is of the most unsubstantial sort. We have quoted the testimony most favorable to the claimant's contentions. This Board is asked to make the inference from this testimony and from all the circumstances of the case that an informal agreement was entered into by the terms of which the United States agreed to reimburse the telephone company for such losses as it suffered by reason of its purchase and installation of new equipment in the F Street building. We are not warranted in making such an inference.

3. The position of the telephone company is that no charge would have been made by it for its costs for purchase and installation of new equipment if its continued use had been required. As in other cases the telephone company would have received out of the revenues which it derived from its service rates enough return to have taken care of its costs of purchase and installation. The record is barren of a suggestion even that any officer or representative of the United States ever told a representative of the telephone company that the United States would bear any portion of the cost of the new equipment.

4. It is the claim of the telephone company that the relations between the United States and the claimant were those which exist between two concerns both engaged in business, one of which performs service for the other; that the telephone company was extremely desirous of performing its whole duty to the United States

in time of war, but being a business corporation its services were not intended to be in the nature of a gift to the United States, and by the same token the Government was not asking or expecting presents from business corporations. The argument is that the telephone company furnished service to the Government under such circumstances that reasonable compensation should be made for work performed, materials furnished, and services rendered just as if similar services had been rendered by one individual to another or by one business corporation to another. It is contended that the United States is in the situation now under the act of March 2, 1919, that a large private corporation would be in, and that if the telephone company had purchased and installed telephone equipment in a building belonging to a private corporation under circumstances identical with those that appear in this claim any court having jurisdiction would hold that the corporation would be under liability to the telephone company to make such fair and reasonable compensation for work performed, materials furnished, and services rendered as the circumstances of the case required. It is urged that the rule and custom of the telephone company, which has been in existence for many years and has been sanctioned by the various public service commissions which control rates and tariffs, is that the subscriber must pay for the costs of installation of new equipment in all cases where its use is temporary or for a short time only, and that the telephone company has never undertaken to install new equipment for an individual or private corporation for temporary use only without payment being made to it of its costs. It is said also that the failure of the United States to give relief to this claimant would result in the Government having obtained valuable services from the telephone company which were essential to the successful performance of its duties by the War Department during the war without furnishing any consideration and that the burden of the loss, amounting to at least \$100,000, would fall upon the telephone company. The representatives of the War Department have testified that the conduct of the officers of the claimant company was in the highest degree praiseworthy and that its efforts was to place itself in a position to comply with the unprecedented demands of the War Department in a manner that would meet with and deserve the approval of the Secretary of War, and that in this effort the claimant company was successful.

5. The telephone company is in a position which is unique. In ordinary cases it pays for new equipment and for the cost of its installation and receives its reimbursement out of its charges for rentals or service rates. It does not appear that the Government had ever at any previous time before our entry into the last war made

any payment to the telephone company in the way of installation charge or for the cost of equipment. The claimant alleges that numerous other departments of the Government have made payment to it under circumstances nearly identical with those that obtain in this case, and that the basis on which payment has been made has been the same as that on which its claim against the War Department is founded. It is stated that the Navy Department had agreed to make payment for the losses occasioned by the discontinuance of the use of the equipment which was installed and used for a short period only, and that the War Department is the only department that does not recognize the obligation to make reimbursement. However that may be, our duty is to make a determination of this claim on the evidence before us and on that evidence we are not warranted in making the inference that an agreement was entered into by which the Government is under obligation to reimburse the telephone company for its losses.

6. The telephone company chose to purchase and install the equipment in the new building without obtaining an assurance of any kind from any representative of the War Department. We can come to no other conclusion than that the claimant company expected that the new equipment would be in use long enough to enable it to take care of its costs out of revenue received. The claimant company does not suggest any express promise or assurance of reimbursement. It concedes that if the equipment had continued to be used it would have made no claim against the War Department. The number of positions was increased from 3 to 75 and the number of stations from a few hundred to 9,600. Its expenditures are given as \$410,741.66. Its revenue from the use of this equipment has probably not equaled that amount but it would not have been an unreasonable expectation in the spring and summer of 1918 that the equipment would have continued in use for a period at least sufficiently long to enable the telephone company to have received enough return from its service rates to have protected it against loss. It follows, as we believe, that it placed its reliance for reimbursement on the confident expectation that its new equipment would continue to be used to that extent which, in the phrase found in the formal contract, would be "reasonably permanent." It was a chance that the claimant took, uninfluenced by any representations or assurances on the part of any representative of the War Department. The fact that the result shows a loss to the claimant is far from furnishing a ground on which to base relief.

7. The new equipment was different in type from that in use in the State, War and Navy Building. The limit in capacity of the former type of switchboard was 2,000 stations. The capacity of the

new switchboard was 9,600 stations, but we are not convinced that these facts have any greater significance than a demonstration that the old facilities had been outgrown and that new facilities adapted to greatly enlarged requirements were found necessary.

No inference may justifiably be made from the fact that the telephone company, with the approval of Mr. Scovel, installed what is called a central-office equipment, serving the largest private-branch exchange in existence, except this, that the telephone company, being well advised, procured the kind of facilities that were best suited to meet the needs of the War Department. This fact neither establishes nor negatives the existence of an agreement between the parties. It shows only that the requirements for telephone service were recognized and that suitable equipment was furnished.

By a parity of reasoning there was no implied agreement entered into between the United States and the telephone company. The situation is not exactly comparable to that which would obtain as between two private corporations. It is almost inconceivable in the first place that a telephone company would undertake to expend any considerable amount of money so as to enable it to furnish telephone service for another corporation without having it plainly understood in advance on just what basis by way of compensation the service was to be rendered. An agreement can not be implied in any case except under circumstances where the party who is to be benefited by the services of the other party is charged with the knowledge that compensation is expected. A reasonable assumption based on previous dealings between the parties that no installation charge would be made must be negatived. It was not brought home to the Secretary of War or to any of his responsible agents that the installation of equipment in the F Street building was to be in whole or in part at the expense of the United States. The Government had the right to assume in the absence of anything much more definite to the contrary than the record discloses that the telephone company was furnishing the new equipment on the same basis that it had always heretofore furnished facilities for telephone service, viz, that the telephone company paid for the facilities and received its reimbursement out of the regular rentals and charges.

8. The fact that the United States assumed control of all the telephone companies after August 1, 1918, under an act of Congress, and that certain of the expenditures for which relief is asked were made after August 1, 1918, does not bring the claim within the provisions of the act of March 2, 1919. On the contrary, it becomes measurably more difficult to find that an agreement was entered into by implication between the claimant company and the United States during the period when the Government was in control of the operation of

the telephone company. The act of March 2, 1919, requires as an indispensable prerequisite to relief the existence of an agreement, express or implied.

9. Our conclusion is that the telephone company has not sustained the burden of establishing an express agreement for reimbursement for its costs of installation of new equipment nor has it proved by a preponderance of the evidence such circumstances as would warrant a finding that an implied agreement for reimbursement was entered into between it and the United States.

DISPOSITION.

A final order will be entered denying relief.  
Col. Delafield concurring.

JUNE 25, 1920.

Case No. Sales BCA-13.

In re CLAIM OF H. MILLER & CO.

1. JURISDICTION.—The Secretary of War has no authority to adjust a claim for damages arising from breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919, either by the payment of money or the substitution of other property.
2. CLAIM AND DECISION.—Dispute involving \$9,180.36 referred under General Order 103, arising from a contract for the purchase of gray gauze from the Government. Claim denied.

Maj. Hill writing the opinion of the Board.

This is a claim under General Order 103 to adjust a dispute under the terms of a contract between the claimant H. Miller & Co. and the Surplus Property Division of the Office of the Director of Purchase and Storage by the terms of which the Government sold certain gray gauze. This claim was received by this Board from the Surplus Property Division, Office of the Director of Purchase and Storage, for an adjustment of this dispute.

FINDINGS OF FACT.

1. On October 3, 1919, as a result of negotiations with claimant, the Surplus Property Division, Office of the Director of Purchase and Storage, sold to claimant and issued four letters of acceptance of bid for gray gauze as follows:

Material or article.	Quantity.	Unit.	Unit price.	Total price.
Gauze, gray, 32 by 28.....	420,005	Yards.....	\$0.05½	\$24,675. 29
Do.....	236,729½	...do.....	.05½	13,907. 89
Do.....	263,594	...do.....	.05½	15,486. 15
Do.....	65,637½	...do.....	.05½	3,856. 22

The letters of acceptance stated that the goods were “to be shipped within 60 days.”

2. Delivery has been made by the Boston zone supply office and payments have been made by claimant as follows:

Surplus Property Division number.	Yards sold.	Yards delivered.	Check received.	Amount invoiced.
No. 3148.....	420,005	382,090	\$24,675. 29	\$22,447. 79
No. 3809.....	236,729½	185,953½	13,907. 89	10,924. 77
No. 3104.....	263,594	209,757	15,486. 15	12,323. 22
No. 3105.....	65,637½	51,902	3,856. 22	3,049. 24
Total.....	985,966	829,702½	57,925. 55	48,745. 02



There remains undelivered and due claimant under these sales 156,263½ yards of gray gauze. This amount is unavailable for shipment owing to the fact that deliveries had already been made by the Boston zone supply office to other purchasers upon authorizations received prior to receipt of authorization under these sales. Claimant has paid the Boston zone supply office \$9,180.53 in excess of the amount required to pay for the gauze actually delivered to claimant.

3. Claimant has requested the delivery of other goods in lieu of the delivery of the balance of gray gauze sold him and has agreed to accept delivery of 32,787 yards of duck, gray, 36-inch, 10-ounce (S. P. D. No. 15659), at 28 cents per yard, at a value of \$9,180.36.

#### DECISION.

1. It is the opinion of this Board that the Government has not fully complied with the terms of any of the contracts, but to the extent of 156,263½ yards has failed to deliver the quantities of gray gauze as offered and sold to claimant by the four letters of acceptance of bid dated October 3, 1919.

2. No regulations covering the form of contract for the sale of surplus property have been prescribed by the Quartermaster General pursuant to section 6853b, Compiled Statutes. This contract is, therefore, not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

3. It is the opinion of this Board that the function of the Secretary of War extends only to the delivery of the subject matter of the contracts. The delivery of other material in lieu of that stipulated in the contracts or the repayment of money to the claimant to cover the quantity undelivered amounts to an adjustment of a claim for damages based upon the breach of contract by the Government in failing to make delivery in accordance with the terms of the contract.

4. It is the opinion of this Board that the Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919.

5. This Board is therefore without authority to grant relief sought by claimant. The claim is accordingly denied.

#### DISPOSITION.

The War Department Board of Contract Adjustment transmits its decision to the Surplus Property Division, Office of the Director of Purchase and Storage.

Col. Delafield and Mr. Tabb concurring.



JUNE 25, 1920.

Case No. 2584.

*In re* CLAIM OF WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

1. **FAILURE OF PROOF.**—Where the claimant's witness testified that he was authorized and directed by a Government officer to incur additional expense by employing overtime labor and shipping by express instead of freight; and this is denied by the Government officer, who had no authority to contract, and who says he merely urged haste, there is not sufficient evidence to establish an agreement under the act of March 2, 1919.
2. **CONSTRUCTION OF CONTRACT.**—Where the contract required the claimant to deliver a switchboard in 75 days, but also contained a provision urging and requesting earlier delivery and does not contain any provision for additional compensation for earlier delivery, claimant is not entitled to recover for additional costs incurred to expedite delivery.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$171.39 express charges and overtime labor. Held, claimant not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim Form B has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$171.39, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On August 10, 1918, the claimant company was given order No. 308488 for furnishing to the Government electrical switchboard panels at the price of \$2,703 in accordance with claimant's proposal of August 8. The said order provides as follows:

“NOTE.—While you have promised delivery as 75 days, it is absolutely necessary that this delivery be bettered if possible. We would like to have you anticipate delivery in 60 days; advise.

“Receipt of this order should be acknowledged by return mail to Maj. C. L. North, Motor Transport Service, Washington, D. C.”

3. The switchboards in question were delivered by the claimant in accordance with its contract and accepted by the transportation company for shipment on October 12, 1918. No claim is made for

the contract price of the switchboard panels, and it is assumed that the claimant has been paid therefor.

4. This claim is for reimbursement of the cost to claimant of having the various parts which were to compose the switchboard shipped from its subcontractors to the claimant by express instead of by freight and for \$100 alleged to have been paid by the claimant for overtime labor in order to complete its contract with the Government in less than 75 days.

5. The claimant alleges that on August 31, 1918, Mr. N. C. Hall, Production Division, Quartermaster Corps, asked the claimant what was the best delivery date it could give on the switchboard and requested the claimant to obtain its material by express instead of by freight and to use overtime in the manufacture of the switchboard panels. Accordingly, the claimant did obtain its material by express instead of by freight at a cost of \$71.39 and paid its labor for overtime the sum of \$100.

In an affidavit Mr. Hall states he did not request the Westinghouse officials to perform the work on an overtime basis or to obtain its material by express, but he did advise the claimant to use all expedition to complete and ship the switchboard and that his words may have been construed and interpreted as an order to use overtime labor and to obtain the material by express. Mr. Hall also states in his affidavit that he did not have any authority to commit the Government on contracts with contractors and on the occasion in question did not commit the Government by any formal order or direction.

#### DECISION.

1. The claimant's contract with the Government required it to deliver the switchboard panels in 75 days and further provided that:

"It is absolutely necessary that this delivery be bettered, if possible."

By accepting this contract, the claimant undertook to use its best endeavors to deliver the switchboard panel in less than 75 days. The contract in question does not authorize the payment of any additional compensation for delivery in less than 75 days. Therefore, according to the terms of the contract, claimant would not be entitled to a bonus for delivery in less than 75 days.

2. The claimant contends that it received instructions to work overtime and to obtain materials by express instead of by freight. These instructions are alleged to have been given by Mr. N. C. Hall, who had no authority to bind the Government and whose duty it was only to hasten production. Admitting, however, that the claimant, in good faith, acted on the statements of Mr. Hall, and did obtain material by express instead of by freight, and did pay labor overtime in

order to speed up production, nevertheless, it does not appear from this record, that the statements made to the claimant by Mr. Hall were definite enough to constitute an order to work overtime, or to obtain shipments by express. In his affidavit, Mr. Hall expressly denies that he gave such an order, but admits that he urged the claimant to hasten production, and that this was the extent of his conversations with the claimant. We are of the opinion that the evidence is insufficient to support an agreement within the meaning of the act of March 2, 1919, which the Secretary of War is authorized to adjust.

3. For the reasons stated, the relief prayed for be and the same is hereby denied.

Col. Delafield and Mr. Cavanaugh concurring.

JUNE 25, 1920.

**Case No. 2804.**

*In re* **CLAIM OF ATCHISON, TOPEKA & SANTA FE RAILWAY CO.**

1. **NO AGREEMENT.**—Where the claimant leased ground to the Government for a camp site, upon which there was a stockyard and trackage facilities, and it was requested to remove same; and it removed same to other ground owned by it and used it in its ordinary business and intended it for permanent use, there is no agreement or obligation on the Government to pay the expense therefor.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$14,961.49 for moving tracks and stockyard. Held, claimant not entitled to recover.

Mr. Averill writing the opinion of the Board.

This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$14,961.49 arising under the act of March 2, 1919. Statement of claim, Form B, has been filed.

A hearing has been had, at which the claimant company was represented by counsel.

The Board finds the following to be the facts:

1. Some time prior to November 9, 1917, and during the emergency created by the war with the German Imperial Government, the United States Government established a camp at Deming, N. Mex., known as Camp Cody. From the record this camp appears to have been located upon lands leased by the Government through the Chamber of Commerce of Deming, N. Mex., and upon a part of the said land so acquired there was located a stockyard and the tracks appurtenant thereto, which said stockyard and the land upon which it was located was the property of the Atchison, Topeka & Santa Fe Railway Co.

2. This stockyard being located on the proposed camp site, the claimant company was requested to remove the same, which was done, and the same was reerected at another point on the claimant company's property and the necessary tracks to serve same built. For the cost of said removal and said reconstruction the claimant seeks compensation on an implied agreement to reimburse the railway for the expenses actually incurred.

**DECISION.**

1. There is absolutely no evidence of any express agreement.
2. The record shows that the property upon which the old stockyard stood had been leased to the Government as a part of the camp

site. It also shows that the new stockyard and the tracks for the construction of which claim is made were located upon property of the claimant company and were used in connection with claimant's business as a common carrier.

3. The record also shows that there was a large camp to be served, and that such facilities as were installed were necessary for the proper handling of the business of the railway company, and the Board is unable to find any facts or circumstances from which an implied agreement could arise obligating the Government to reimburse claimant for the amounts expended upon said stockyard and facilities.

4. For the reasons *supra* the Board is of the opinion that no agreement, either express or implied, within the purview of the act of March 2, 1919, arose whereby the Government is obligated to reimburse claimant for expenditures made.

5. Relief must, therefore, be denied and the decision of the Claims Board, Transportation Service, is hereby affirmed.

#### DISPOSITION.

1. A final order denying relief will issue.  
Col. Delafield and Mr. Hopkins concurring.

JUNE 25, 1920.

**Case No. 1617.**

*In re* **CLAIM OF AURORA DOOR HANGER AND SPECIALTY CO.**

- 1. SETTLEMENT OF CONTRACT—CANCELLATION.**—In order to be effective in terminating a contract in the sense of depriving the Secretary of War of jurisdiction, a cancellation must be accepted or acquiesced in by the contractor.
- 2. CLAIM AND DECISION.**—This claim was decided by this Board adversely to claimant in its decision dated March 31, 1920. This Board, however, held that the settlement offered by the Claims Board, Construction Division, was a proper one. The Claims Board has asked for further instructions regarding the settlement of the claim in view of the fact that claimant refused to accept orders for materials given in the settlement of the claim, thereby automatically canceling the uncompleted portion of the original order. Held, the Secretary of War has jurisdiction and the claim should be settled in accordance with Supply Circulars 111 (1918) and 19 (1919). For the facts see the original decision of this Board, volume IV, p. 768.

Maj. Blackburn writing the opinion of the Board.

**SUPPLEMENTAL FINDINGS OF FACT.**

1. The former decision of this Board in this case was transmitted to the Claims Board, Construction Division, for appropriate action, and that Board by letter of date April 10, 1920, requests information of this Board "as to how it should proceed in adjusting the claim" in the light of certain stated facts, which renders a further finding of facts desirable, and are now to be considered.

2. Upon receipt of the five authorizations for fire-door hardware, which the Government offered claimant in full completion of the original blanket order, claimant addressed a letter to the Chief of Construction Division of date May 29, 1919, declining to accept or fill the requisitions on account of the full release clause accompanying each, but in the same letter conveying the idea of its readiness to enter the orders, the materials for which to be applied against its claim.

3. Replying to the above letter of May 29, Brig. Gen. R. C. Marshall, jr., Chief of Construction, addressd a lttr to claimant of date June 4, 1919, paragraph 2 of which reads as follows:

"2. These orders were sent you to complete the balance of blanket order for 100,000 square feet of fire-door hardware, and on which

blanket order you acknowledged to have shipped 87,000 square feet, leaving a balance of approximately 13,000 square feet to complete the order. Your refusal to accept these orders has automatically canceled the uncompleted portion of the blanket order, and we will within the next few days forward you a formal cancellation of same, and the matter is, therefore, closed so far as this department is concerned, but for your information will advise that you have recourse to the Board of Contract Adjustment, Munitions Building, Washington, D. C."

4. On June 7, 1919, claimant telegraphed the Chief of Construction Division as follows:

"Our shipment May 23 was on rush order to Maj. Gray, Baltimore, with no strings attached, and went forward before your requisition 59 was mailed from Washington. *Will accept orders to apply on contract but not to complete.*"

No reply to this telegram was received by claimant and on July 17, 1919, an appeal was taken to the Board of Contract Adjustment.

#### REVISED DECISION.

5. In order for cancellation or attempted cancellation to be effective as terminating a contract in the sense of depriving the Secretary of War of jurisdiction to adjust and settle same by supplemental contract, it must be accepted or acquiesced in by the other party. The proposition is stated by Mr. Black in his work on Rescission and Cancellation, page 21, as follows:

"It is a general rule that a contract properly entered into by competent parties and founded upon a consideration, and which one of the parties is able and willing to perform, can not be rescinded by the other, unless he is able to show the existence of some well-recognized title to equitable relief, such as fraud, mistake, or duress. The homely proverb teaches that 'it takes two to make a bargain.' This is both good sense and good law. And the converse is equally good law—that 'it takes two to undo a bargain once properly made.'"

The authorizations offered claimant in completion of the blanket order were not unconditional, by reason of the following clause appearing therein:

"Acceptance of this order closes blanket order and vendor agrees to waive all claims for further orders or compensation in connection therewith."

Consequently the rejection of, or refusal to comply with, the requisitions by claimant did not amount to a breach of the original order on its part which would authorize the subsequent attempted cancellation of the order by the Chief of Construction Division.

6. Nor can it be held that claimant agreed to or acquiesced in the cancellation of the order by the Chief of the Construction Di-



vision. On the contrary, as evidenced by its telegram of June 7, 1919, claimant did not accede to the cancellation, but still insisted upon supplying materials in completion of the original blanket order, and is here prosecuting its claim under said original order.

7. The original blanket order not having been terminated, either by completion or by cancellation, the Secretary of War retains jurisdiction to enter into a supplemental settlement agreement with claimant upon a "fair and equitable basis," which will be effected in accordance with Supply Circulars No. 111, November 9, 1918, and No. 19, March 6, 1919, as applicable to the facts in this case and in the manner provided in the former decision of this Board.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its former decision, together with this revised decision, to the Claims Board, Construction Division, for appropriate action.

Col. Delafield and Mr. Marcum concurring.

JUNE 26, 1920.

Case No. 2654.

*In re* CLAIM OF SEABOARD AIR LINE RAILROAD, FEDERAL ADMINISTRATION.

1. **RAILROAD FACILITIES.**—Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks on its own right of way for the purpose of supplying a Government camp with proper railroad facilities. Nor is such an obligation to be implied from a request by a Government officer to lay a frog and switch on its main line for the same purpose.
2. **CLAIM AND DECISION.**—Appeal from the decision of the Transportation Claims Board denying relief on a claim for \$1,794.36 filed under the act of March 2, 1919, based upon an alleged implied agreement in relation to the construction of tracks, including a frog and switch, at Camp Polk, N. C. Decision affirmed.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal from the decision of the Claims Board, Transportation Service, on a claim for \$1,794.36 under an alleged implied contract.

2. At a conference on or about October 16, 1918, between Maj. Louis M. Lang, constructing quartermaster at Camp Polk, N. C., and Mr. P. G. Walton, division superintendent of the Seaboard Air Line, the question of railway facilities to serve Camp Polk was discussed.

3. At the above-mentioned conference Maj. Lang requested that the Seaboard Air Line install a frog and switch upon the railroad right of way in order that the Government might build and connect up a spur track leading into Camp Polk. No arrangement as to payment was made. The frog and switch was forthwith built by the Seaboard Air Line upon its main line right of way. The Government then constructed the spur, and the frog and switch were utilized for the purposes aforementioned.

4. At the above-mentioned conference Mr. Walton suggested to Maj. Lang that by relocating a certain crossover located on the railroad right of way 25 car lengths of siding could be made available for the purpose of storing cars consigned to Camp Polk. Maj. Lang expressed his approval, but no arrangement as to payment was made, and the Seaboard Air Line forthwith moved a crossover from one

point on its right of way to a new point on the railroad right of way. The crossover was thereafter utilized for the purposes aforementioned.

5. At the above-mentioned conference Mr. Walton suggested to Maj. Lang that a crossover between the northbound and southbound main line tracks be constructed, permitting the southbound traffic to reach the camp. It seems that the northbound track belongs to the Seaboard Air Line and the southbound track belongs to the Southern Railroad, but both railroads use the tracks jointly. Accordingly, the crossover also operated to connect up Camp Polk with the Southern Railroad. Maj. Lang expressed his approval of Mr. Walton's plan, but no arrangement as to payment was made, and the Seaboard Air Line forthwith installed the crossover, which when completed was used for the purposes aforementioned. Claim is here made only for the portion of the crossover located upon the Seaboard Air Line right of way.

6. The maintenance charges for which claim is made were expended in connection with tracks on the railroad right of way.

7. The construction work for which claim is here made was completed on or before November 9, 1918.

#### DECISION.

1. This claim is within the provisions of the act of March 2, 1919.

2. There was no express agreement on the part of the Government to pay for the construction and maintenance which is the subject of this claim.

3. In view of the purposes for which the construction in question was made, the advantages accruing to the railroad as well as to the Government, the prospective profits to be derived from the increased business, and the general custom of railroads, we find that no implied contract on the part of the Government to pay for this construction and maintenance arose.

4. The decision of the Transportation Claims Board denying relief is affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 26, 1920.

**Case No. 2750.**

*In re* **CLAIM OF W. G. HAMMER (PENROD WALNUT & VENEER CO.).**

1. **FAILURE OF PROOF.**—Where claimant fails to comply with requests for proof of an agreement coming within the provisions of the act of March 2, 1919, his claim must be dismissed.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for an unnamed amount, based upon an alleged agreement to pay claimant a commission for buying walnut lumber. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is informally presented and is for an indefinite amount.

2. On June 2, 1919, the claimant addressed the following letter to the War Department:

“Being acquainted with the people and helping with a sawmill in this locality I have become acquainted with a number of tracts of timber. Last summer and fall I went out with one of your men, who represented himself as a Government man, buying black walnut logs, and did buy and deliver from this point close to 80,000 feet, for which I was promised a commission, which I did not get. He left this locality and never came back.

“What way could you advise to get this money without litigation?”

In response thereto the recorder of the Air Service Claims Board wrote the claimant that the data given was too indefinite and requested the claimant to file his claim in accordance with the provisions of Supply Circular 17, a copy of which was inclosed.

On June 22, 1919, the claimant addressed two letters to the Air Service Claims Board, in one of which he states:

“I first went to work for John W. Henny & Co. through a man by name of Hunt, who was sent to this vicinity to purchase black walnut timber. The commission was agreed upon which was \$10 per thousand, and nothing has been paid on this as yet.” \* \* \*

The letter then sets out the names of the purchasers of the logs and continues:

"When I found out that this man Hunt was misrepresenting things I went to work for the Penrod Walnut & Veneer Co., Kansas City, Mo." \* \* \*

3. On July 16, 1919, the Air Service Claims Board acknowledged the receipt of the claimant's two letters of June 22 and again requested him to file a statement of claim as outlined in War Department Supply Circular No. 17, stating that the information contained in claimant's previous letters was entirely too vague and indefinite to pass on the merits of the case. No reply having been received the Air Service Claims Board again wrote the claimant on October 20, repeating its previous request.

4. On April 26, 1920, the Claims Board, Air Service, transmitted this file to the Board of Contract Adjustment. On May 29 a Government attorney for this Board wrote the claimant in part as follows:

"To the end that your claim may be properly before the Board, you are asked to submit an affidavit stating more in detail the basis of your claim. That is to say, what officer of the Government negotiated with you for the purchase of lumber; in what capacity he represented the Government; the nature, terms, and conditions of the oral agreement had with him, and his present address, if you know." \* \* \*

Not having received any reply to this letter, this Board sent a telegram to the claimant on June 15, 1920, reading as follows:

"Please reply to letter of May 29 immediately."

No response has been received to the said telegram.

#### DECISION.

1. Although the claimant has been repeatedly requested so to do, he has failed to submit any evidence tending to show a claim which the Secretary of War is authorized to adjust under the act of March 2, 1919. He has wholly failed to show that "the man named Hunt" referred to in his letter to the War Department and to the Air Service Claims Board was an authorized agent of the Secretary of War or of the President, or to state definitely any facts upon which this Board may grant relief.

2. For the reasons stated, the claim is denied.

#### DISPOSITION.

The above-mentioned claim is dismissed.  
Col. Delafield and Mr. Hendon concurring.

JUNE 26, 1920.

**Case No. 2797.**

*In re* **CLAIM OF THE ALUMINUM CASTINGS CO.**

1. **DEPRECIATION IN VALUE OF SCRAP.**—Under a provision of a validly executed contract for the manufacture of aluminum castings providing for an increase in the price to be paid by the Government in the event of any increase in the cost of aluminum, there is no merit in a claim based upon depreciation in the value of claimant's scrap aluminum due to the intervention of the armistice. Claimant's contention that this scrap, which resulted largely from its defective Government castings, and could only be reused for commercial castings, was a factor in the cost of the castings manufactured for the Government, within the meaning of the contract, is unsound.
2. **SAME—RESPONSIBILITY FOR DELAY.**—Where claimant's Government contract provided for return of defective castings to claimant, there is no implied agreement by the Government to insure the immediate return of the castings by the engine builders to whom they had been delivered. Hence there is no merit in a claim based on depreciation of scrap aluminum caused by such delay in returning defective castings and the fall in the price of aluminum on the intervention of the armistice.
3. **CLAIM AND DECISION.**—Claim presented under General Orders 103 for \$72,711.01, based upon a validly executed contract for aluminum castings. Held, claimant is not entitled to recover.

Mr. Williams writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

This is an appeal from a decision of the Air Service Claims Board for \$72,711.01 on a formally executed contract under the following circumstances:

1. On or about September 16, 1918, claimant, the Aluminum Castings Co., a corporation organized and existing under the laws of the State of Ohio, entered into a formal contract dated on that day with the United States of America, through Capt. O. R. Ewing, Air Service Airplane Production, whereby it agreed to make and deliver 10,000 complete sets (except pistons) of aluminum castings for United States standardized 12-cylinder aviation engines, at the agreed price of 74½ cents per pound.

2. The said contract provided that deliveries should begin not later than October 1, 1918, and continue at the rate of not less than 120 sets of castings per day until November 1, 1918, when the minimum rate should be increased to 150 sets per day, and thereafter

increased up to a minimum of 300 sets per day; said last-mentioned minimum to be attained not later than January 1, 1919. This contract received the number 4,723. The formal contract referred to contained the following clause:

"ARTICLE IV. 2. All articles in which defects may be discovered after acceptance and delivery, except internal defects not apparent until a machine cut has been made, may be returned to the contractor, and the contractor will allow the Government an amount equal to thirty and one-half (30½) cents per pound net weight on all such articles returned.

"3. All articles which develop, upon machining, internal defects not apparent until so machined, shall be returned to the contractor, and the contractor will therefor credit the Government at the selling price per pound of the articles at the net weight returned. The freight charges thereon, if any, shall be paid by the contractor."

3. In the manufacture of aluminum castings scrap aluminum accumulates, which is of three general classes: (1) Pieces which are not an integral part of the casting, such as core plates, core dryers, clamps, etc., known generally as "chill"; (2) pieces of metal cut off the casting after it has been poured and taken out of the mold, such as gates, sprues, risers, etc.; and (3) defective scrap castings returned to claimant by contractors who were manufacturing the Liberty motor engines and using the parts made by claimant in this manufacture.

4. Claimant alleges that the manufacturers of the engines unreasonably delayed returning these defective castings until after the armistice, so that on December 31, 1918, it had an accumulation of 689,023 pounds of scrap castings or scrap aluminum for which it had now no market. The scrap upon which claim is made has been returned to claimant and used by it in its commercial business. The market price of aluminum fell with the armistice, and the value of the scrap aluminum correspondingly.

5. Claimant's position respecting this item is set forth in a letter from A. H. Bealer, secretary of the claimant's administration department, to Maj. F. E. Taylor, Board of Contract Adjustment, as follows:

"In foundry practice, in addition to patterns, there are certain tools and supplies which are necessary, which do not go into the cost of making the casting. As an example: In order to turn out aluminum castings in quantity production a large quantity of metal must necessarily be scattered throughout the shop in the form of chills, clamps, core plates, core dryers, and various metal shapes, which are used in the actual making of the rough casting, but which do not become a part of it. A part of the claim for the loss of aluminum is made up of items such as these, which in the ordinary course of events would have gradually been remelted and used in the making of commercial castings, but on account of our instructions for continuous production and increased volume we naturally



increased the quantity of these items around the plants, and therefore had a large supply of these to take as inventory December 31, 1918, when the value of metal of this secondary nature had dropped from approximately 90 cents down to approximately 20 to 22 cents. The other items which go into making up this aluminum inventory are gates, sprues, risers, and defective and scrap castings. The first three mentioned, i. e., gates, sprues, and risers, are pieces of metal which are cut off of the casting after it has been poured and taken out of the mold, this being known as the 'trimming operation,' it being necessary to have these when the casting is being made to allow for its proper pouring, proper cooling, and economic operation.

"The defective and scrap castings are those which are returned by customers. The reason for the large quantity of these being on hand as of December 31, 1918, was that prompt return of these castings was not made by the contractors to whom these were being furnished, and practically all of these had been returned to us during the month of December, making an unusually heavy inventory December 31, 1918. Furthermore, even had these castings been returned with reasonable promptness by the contractors, it would not have been possible to consume this scrap in the production of Liberty motor work, due to the rigid enforcement of close limits on technical properties of the castings and the close melting control necessarily established by the Aluminum Castings Co. to meet these requirements."

6. The claim here made is on account of depreciation in price of the scrap aluminum which accumulated in the possession of petitioner as of December 31, 1918, as a result, for the most part, of the return to petitioner from engine builders of scrap aluminum resulting from defective castings made by the petitioner. In making this claim petitioner relies upon paragraph 4 of article 7 of the formal contract, which reads as follows:

"In the event of any increase or decrease to the contractor in the cost of aluminum and of copper, the price of such articles as are affected thereby shall be increased or decreased by the amount of such increase or decrease."

7. The subject matter of this claim has already received the consideration of this Board in Case No. 517, which involved, primarily, an informal contract of October 25, 1918, for 10,000 aluminum castings other than those mentioned in the formal contract. (Vol. II, pt. 3, p. 37, of the Decisions of the Board of Contract Adjustment.) In that case this Board said:

"The formal contract, No. 4723, contains no engagement on the part of the Government to return rejected or defective castings, nor does the Government insure their prompt return by the engine builders to whom the claimant delivered them. Furthermore, it is clear from claimant's own testimony that little, if any, of the metal in such returned goods could have been used for the second set of castings. It would also follow that even if the second contract had been awarded and performed and the scrap from the first contract made use of as far as practicable, as suggested by the claimant, it would

nevertheless have had on its hands substantially an equivalent amount of scrap at the conclusion of the second contract. It would have suffered a corresponding loss in value through the fall in the market price of aluminum. It is thought, therefore, that if there is any liability on the part of the Government arising in connection with this scrap, relief must be sought under contract No. 4723, which, it appears, is now in process of settlement by the Air Service Claims Board and has not been terminated."

#### DECISION.

1. As has heretofore been said by this Board:

"The formal contract No. 4723 contains no engagement on the part of the Government to return rejected or defective castings, nor does the Government insure their prompt return by the engine builders to whom the claimant delivered them."

So that any claim based merely upon the belated return of defective castings can not be entertained. Nor do we think that petitioner is entitled under clause 4 of article 7 to any increase in price to be paid by the Government for castings that were delivered and accepted. This clause of the contract provides that "the price of such articles as are affected thereby" shall be increased or decreased by the amount of the increase or decrease in the cost of aluminum or copper. The only articles that could be affected by the increase in the cost of aluminum would be the castings to be manufactured, and these castings could only be affected by the original cost of pure aluminum that went into their manufacture, because scrap aluminum was not used and could not be used in the manufacture of these castings. The scrap aluminum, as frankly admitted by the petitioner, was intended to be used only in the manufacture of commercial articles. The accumulation of scrap aluminum was a result naturally to be expected from the manufacture of the character of castings that petitioner undertook to manufacture under the terms of the written contract, and it must be presumed that the calculations upon which was based the unit price per pound the Government was to pay for this stuff embraced the consideration of the accumulation of this scrap material. In no way, do we think, can the fall in price of this scrap aluminum due to the coming on of the armistice be traced to the fault or ascribed as an obligation of the Government of the United States.

2. For the above reasons all relief asked for in this case must be denied.

#### DISPOSITION.

Order denying relief will be issued by this Board.

Col. Delafield and Maj. Farr concurring.

JUNE 26, 1920.

**Cases Nos. 2642-2645; Cases Nos. 2647-2648; Case No. 2627.**

***In re* CLAIMS OF SOUTHERN RAILROAD CO.; ATLANTIC COAST LINE; SEABOARD AIR LINE RY. CO.**

- 1. RAILROAD FACILITIES.**—Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for the purchase of right of way and construction of tracks thereon for the purpose of supplying a Government camp with proper railroad facilities. Nor is such an obligation to be implied from a statement of the camp requirements by a Government officer.
- 2. CLAIM AND DECISION.**—In these seven (7) cases appeals were taken from the decisions of the Transportation Claims Board denying relief. The claims are for varying amounts, are presented under the act of March 2, 1919, and are based upon alleged implied agreements in relation to the acquisition of right of way and construction of tracks in the vicinity of Camp Jackson, S. C. All of the decisions are affirmed by this Board.

Mr. McCandless writing the opinion of the Board.

#### FINDINGS OF FACT.

This is an appeal from a decision of the Claims Board, Transportation Service. Seven separate claims were filed, all based upon an alleged implied contract. The parties concerned agreed that said claims should be heard and disposed of together.

On May 31, 1917, Col. Albert C. Dalton, assistant to the chief quartermaster, Headquarters, Southeastern Department, and member of the Camp Site Board, conferred with representatives of the Southern Railroad, Atlantic Coast Line, and the Seaboard Air Line. The conference was called to determine what railroad facilities would be required and what steps would be taken by these railroads to provide facilities for a large Government cantonment later known as Camp Jackson, S. C. Col. Dalton stated the camp requirements, and the railroad representatives submitted a plan whereby all three roads could obtain access to Camp Jackson over one set of tracks. It was agreed that the roads should acquire the necessary right of way and construct the proposed tracks. No agreement was entered into regarding payment.

The roads, acting jointly, proceeded forthwith to acquire the necessary right of way and lay the proposed track. Thereafter the

track was utilized by the three roads jointly for the purpose of handling both freight and passenger service to and from Camp Jackson. The cost of construction and maintenance have been borne by the three roads and claim is now filed by each of the said roads for their expenditures in connection with the following items:

1. Cost of right of way from Childs via Sims to Camp Jackson.

This right of way was used by the roads in laying the tracks in question.

2. Cost of construction of tracks and facilities from Sims to Camp Jackson.

This is a track leaving the Atlantic Coast Line Railroad main line right of way at Sims and extending a distance of 15,080 feet to the boundary line of Camp Jackson.

3. Cost of interlocker and signal at Sims.

4. Cost of construction of tracks and facilities from Childs to Sims.

This track is 2,405.1 feet in length and leaves the Southern Railway main line right of way at Childs and connects up with the Atlantic Coast Line Railroad main line right of way at Sims, thereby affording means whereby Southern Railway trains and Seaboard Air Line trains (which use the tracks of the Southern Railway) could proceed from the main line of the Southern Railway to Camp Jackson via the spur track referred to above.

All of the above expenditures were made for the purpose of supplying railroad service to Camp Jackson and none of the above construction is located upon Government property, or is within the limits of the Government cantonment.

#### DECISION.

1. This claim is within the provisions of the act of March 2, 1919.

2. There was no express agreement upon the part of the Government to pay for this construction or to reimburse the railroads for expenditures made in the purchase of the right of way.

3. In view of the purposes for which the construction in question was made, the advantages accruing to the railroads, as well as the Government, the prospective profits to be derived from increased business and the custom of railroads, we find that no implied agreement on the part of the Government to pay for this construction or for this right of way arose.

4. The decision of the Transportation Claims Board denying relief is affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 26, 1920.

**Case No. 2656.**

*In re* **CLAIM OF SEABOARD AIR LINE RAILWAY CO.**

1. **RAILROAD FACILITIES.**—Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks on its own right of way for the purpose of supplying a Government camp with proper railroad facilities.
2. **CLAIM AND DECISION.**—Appeal from the decision of the Transportation Claims Board denying relief on a claim for \$6,640 filed under the act of March 2, 1919, based upon an alleged implied agreement in relation to the construction of a siding near Montgomery, Ala. Decision affirmed.

Mr. McCandless writing the opinion of the Board.

**FINDINGS OF FACT.**

This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$6,640, under an implied contract.

1. At a conference on July 21, 1917, between a member of the Camp Site Board, Capt. C. H. Lee, aid to Maj. Gen. Wood, and Mr. William D. Faucette, chief engineer of the Seaboard Air Line, Capt. Lee stated that Seaboard Air Line rail facilities were required in connection with Camp Sheridan (a large Government cantonment), and indicated in a general way that about 2,000 feet of siding would be required for unloading and moving materials to and from Camp Sheridan. No agreement was entered into regarding payment.

2. On July 23, 1917, there was a conference between representatives of the various railroads that were to serve Camp Sheridan. Mr. W. C. Seddon, vice president of the Seaboard Air Line, presided. Representatives of the Government were not present, but under date of July 23, 1917, Mr. Seddon sent to Capt. Lee a memorandum of said conference, which reads in part as follows:

“It was understood \* \* \* that the Western Railroad of Alabama and the Seaboard Air Line Railway would respectively construct, at their expense, the necessary sidetracks on their right of way, for the proper handling of this business.

“That in connection with tracks into the camp on the Government property and for the Government service, that these tracks would be constructed by the Government at their expense.”

3. Under date of July 25, 1917, Capt. Lee wrote Mr. Seddon as follows:

"Your letter of July 23rd, from Montgomery, enclosing the memorandum of conference held there that day has been received and noted.

"General Wood desires me to thank you for your courtesy in this matter and to explain to you that all matters relative to actual construction details and methods of settlement must be handled by the Constructing Quartermaster on the ground, Major A. W. Reynolds, Quartermaster Corps, Ohio National Guard, Montgomery. In case a satisfactory agreement cannot be had with this officer, your line of appeal is to Colonel Isaac Littell, in charge of constructing cantonments and camp sites, Quartermaster General's Office, Washington.

"My letters to the representatives of the railroads were merely for the purpose of suggesting a rational layout of coordinating the military needs with efficient railroad operation. The matter of who builds the tracks and how reimbursement is made cannot be handled through these headquarters."

4. Between August 1 and August 15, 1917, the Seaboard Air Line constructed a double-end siding on its own right of way, approximately 2,300 feet long. Thereafter the siding was used for the purposes aforementioned.

5. It does not appear that the Seaboard Air Line took up the question of payment with the officers mentioned in Capt. Lee's letter of July 25, or had any further negotiations upon the subject of payment. This claim is for the cost of construction and maintenance of the above-mentioned double-end siding, and is based upon the theory of implied contract.

#### DECISION.

1. That this claim is within the provisions of the act of March 2, 1919.

2. That there was no express agreement upon the part of the Government to pay for this construction and maintenance.

3. That in view of the purposes for which the construction in question was made, the advantages accruing to the railroads as well as the Government, the prospective profits to be derived from increased business, and the custom of railroads, we find that no implied agreement on the part of the Government to pay for this construction and maintenance arose.

4. The decision of the Transportation Claims Board denying relief is affirmed.

Col. Delafield and Mr. Fowler concurring.



JUNE 26, 1920.

**Case No. 1734.**

*In re* **CLAIM OF TORREY-EPSTEIN CO.**

1. **RECOMMENDATION.**—The recommendation of an award of a contract does not constitute an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$18,601 based upon an alleged agreement for the manufacture of wool trousers. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$18,601, by reason of an agreement alleged to have been entered into between the claimant and the United States.

This case was set for hearing before this Board on January 12, 1920, and postponed at the request of the claimant. On April 22, 1920, this Board wrote the claimant asking if it desired a hearing and received a reply from the claimant's attorney that he expected to be in Washington in two or three weeks. On April 29 this Board wrote the claimant requesting it to be ready to present its case at a hearing if one is found necessary and received a reply from the claimant, dated May 1, 1920, stating that it would be difficult to arrange a hearing at that time. On May 17 this Board again requested the claimant to cooperate with the Board to obtain a disposition of the case and on June 14 this Board telegraphed the claimant asking whether it desired a hearing or a decision on the record. On June 15 the claimant's attorney wrote stating that he would send an affidavit in a few days and stating further—

“it may be that I shall decide to submit the case to your Board on the papers of record.”

On June 17 this Board wrote the claimant that the case would be disposed of on the record and that any additional affidavits filed would be considered. On June 21 claimant's attorney submitted an additional affidavit which he requested to be considered with the



other papers in the case and that he be advised of the decision of this Board. Owing to the repeated requests by this Board and the failure to get any satisfactory responses from the claimant, the case, with the apparent consent of the claimant, is decided upon the record without a hearing.

It appears from a letter, dated May 1, 1920, from Frederick W. Mowatt, the claimant's attorney, that the Torrey-Epstein Co. is out of business and made, in December, 1919, an assignment to Mr. Mowatt for the benefit of its creditors.

It does not, therefore, appear that the proper party in interest is before this Board as claimant, but we may pass this fact as our decision will be rested upon the merits of the claim.

2. The claimant was a manufacturer of wool garments and from 1917 until the signing of the armistice its plant had been devoted practically exclusively to Government work, subsequent contracts having been awarded as the prior contracts were about to be completed. From time to time Government officials had written the claimant urging it to hasten production, and on August 16, 1918, Mr. B. F. Tully, of the clothing procurement section, office of acting quartermaster general, New York, wrote the claimant that the new method of awarding contracts required the sending of the contracts to Washington for approval by the Board of Review and also stating that the Government was not then awarding any contracts beyond November 30, 1918.

3. On November 2, 1918, Lieut. Lawrence S. Mann, Q. M. C., assistant depot quartermaster, Boston, wrote to the claimant in part as follows:

"This depot has just received advice from the office of the quartermaster general, New York City, that you have been recommended for an award on woolen trousers, delivery to commence on January 4th."

This letter further states that the claimant had been delinquent on its present contracts and it should make every effort to overcome this delinquency and that it would be necessary for it to start first deliveries against its new contract on January 4, as the material will be issued to the contractor not later than December 1. It also requested advice when the claimant contemplated completing its present contracts.

On November 4, 1918, the claimant replied to the depot quartermaster, stating that it was not delinquent on its present contracts; that it expected to complete cutting on one of its contracts at the end of the present week, and to finish that contract about December 10, and another contract about December 1. It also stated:

"If you can make shipments to us of the cloth and the findings for the new contract before Saturday, it will enable us to keep right on cutting and keep our organization intact."

4. It appears that on October 31, 1918, the chief of the clothing and equipage division, quartermaster general's office, New York, approved a purchase order to the claimant of 56,000 wool trousers at 72 cents each, deliveries to be made as follows:

Eight thousand for the week ending January 4, 1919, and eight thousand thereafter until the said contract was completed on February 15, 1919.

This recommendation was never approved by the Board of Review in Washington, and it does not appear from the record that the claimant ever received any other notification from the Government relative to said award, other than those above enumerated, until November 16, when it received notice to suspend operation on all Government contracts.

There is no evidence that the claimant was furnished, by the Government, with the necessary material with which to perform the contract, or that it was directed to commence production, or that it was specifically directed to buy additional equipment, either to expedite existing contracts or to perform future contracts.

The claimant has furnished an affidavit supported by vouchers, showing the purchase of material suitable for this contract, and for machines and repairs to its plant, dating from June 21, 1918, to November 16, 1918. It also submits an affidavit supported by a telegram from "Yates Inspection," dated September 13, 1918, urging it to speed up production, and a circular letter dated September 16, from Lieut. Mann, urging it to increase production up to its maximum point. The claimant contends that as its work for the Government has been continuous, it was required to prepare in advance for future orders and it increased its capacity, assuming that it would be reimbursed by the Government in event the work was suddenly stopped.

#### DECISION.

1. The claimant contends that it was awarded a contract for 56,000 pair of wool trousers on November 2, 1918, as evidenced by the letter of that date from the depot quartermaster, Boston. The letter in question is not an award of the contract, but merely states that the depot quartermaster, Boston, had been advised by the office of the quartermaster general, New York, that the claimant had been recommended for an award of wool trousers, delivery to commerce on January 4, 1919. The contract was never approved by the Board of Review in Washington, and the claimant had previously, on August 16, 1918, been notified by the acting quartermaster general, New York, that such approval was necessary. It was, therefore, not justified in assuming that the recommendation

for award without the approval of the Board of Review constituted a contract. It has been repeatedly held by this Board that it does not constitute a contract and that it may not be made the basis for expenses incurred by a contractor who does not actually receive an award of the contemplated contract prior to November 12, 1918.

2. Most of the expenses for which the claimant now seeks reimbursement were incurred prior to November 2, 1918, when it alleges that it received notice of the recommendation of the award of the proposed contract. None of these expenses can be said to have been incurred on faith of the alleged contract, but they are clearly expenses incurred in anticipation of receiving future contracts which the claimant was not awarded.

3. We are of the opinion that the record wholly fails to disclose any grounds upon which the relief prayed for may be granted and for such reason the relief prayed for is denied.

Mr. McCandless and Mr. Hendon concurring.

JUNE 26, 1920.

Case No. 2776.

*In re* CLAIM OF TURNER & MOORE MANUFACTURING CO.

1. **SUPPLEMENTAL CONTRACT — RELEASE — AMORTIZATION.** — Where claimant's contract to machine 63,300 hubs for artillery wheels was reduced in quantity by supplemental agreements in which claimant released the United States Government from all liability under the original contract, amortization of indirect materials on suspension settlement should be based upon the quantities provided for in the supplemental and not the original contract.
2. **CLAIM AND DECISION.**—This claim for \$49,518.18 is an appeal from the decision of the Ordnance Claims Board and arises under formally and informally executed contracts. Held, claimant is not entitled to relief.

Mr. Hugh C. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Ordnance Claims Board on a claim for \$49,518.18 on formally and informally executed contracts under the following circumstances:

2. Claimant had a contract dated December 17, 1917, for the machining of 63,300 hubs for 56-inch artillery wheels and wheel fasteners, the Government to furnish the forgings in the rough. Deliveries were to begin 40 days from the date of receipt of order and forgings, and to continue at the rate of 2,300 per week thereafter until the entire number were delivered, final deliveries to be not later than June 30, 1918. The price per set was fixed at \$13.95 and the total purchase price at \$883,035. It is provided in the contract that during the period of performance and within two months after the date of the execution thereof the Government may order additional articles not to exceed 20 per cent of the quantities contracted for, and that "the United States may accept, with the consent of the contractor, in full satisfaction of this contract such lesser quantities of the articles herein contracted for as the contracting officer may designate." The contract is signed on behalf of the Government "Samuel McRoberts, Col. Ord. Dept., N. A., by Chas. N. Black, Lt. Col. Ord. Dept., U. S. N. A." This contract was suspended December 13, 1918, after 28,300 hubs and wheel fasteners had been machined.

3. The Government delayed furnishing forgings beyond the time originally contemplated. The first forgings—6 in number—were delivered to claimant February 10, 1918. The next delivery was on February 25, 1918, when 108 forgings were delivered. Claimant complained that these forgings were of a hardness that it had not expected, and also that they required more machining than claimant

had estimated. Claimant insisted that its machinery was too light to satisfactorily machine such forgings. It delivered none of the finished forgings prior to the month of May and only 7 during that month.

4. The Government contended that claimant should proceed to machine forgings of the kind furnished by the Government, and that the delay in the performance of the contract was due to claimant's refusal to machine forgings of the kind furnished.

5. Claimant insisted that the delay was because of the Government's failure to furnish forgings such as claimant might reasonably have anticipated the Government would furnish.

6. While this dispute continued claimant's plant remained idle, or nearly so, and the Government threatened cancellation of the contract. About April 29, 1918, claimant's president, Mr. W. Campbell Moore, advised the ordnance inspector at the plant, Lieut. A. L. Norris, that it would be satisfactory for the Government to cancel 20,000 hubs and fasteners. This understanding was embodied in a procurement order dated May 9, 1918, which reduced the quantity of hubs and fasteners from 63,300 to 43,300. This reduction was recommended by Maj. J. G. Scrugham, Ordnance Department, by letter dated May 3, 1918, because of claimant's inability "to carry on contract." The order of May 9 states, "Your acceptance of this amendment will constitute a full release to the United States of all claims and demands whatsoever arising out of this amendment." Claimant accepted this cancellation by letter dated May 20, 1918.

7. Afterwards, and on July 10, this number was further reduced by a formal supplemental contract of that date, signed on behalf of the Government by William Williams, lieutenant colonel, Ordnance Department, National Army, contracting officer. This supplemental contract provides, in part, as follows:

"ARTICLE 1. The contractor shall deliver and the United States shall accept in full and complete satisfaction of the above-mentioned contract the following-named quantity instead of that provided for in the original contract at the price stated below:

38,300 hubs for 56" artillery wheels and wheel fastenings, at a price of \$13.95 per set.

"ARTICLE 2. No further delivery under the above-mentioned contract, beyond delivery of the items agreed upon in Article 1 hereof, shall be required of the contractor, and no payments other than for the items so delivered shall be required of the United States. The United States is hereby released from any and all claims and demands whatsoever arising out of this partial cancellation of the contract of December 17, 1917, as amended by procurement order of May 9, 1918.

"ARTICLE 3. Except as hereinbefore modified, all the terms and conditions of the contract of December 17, 1917, as amended by procurement order of May 9, 1918, shall remain in full force and effect."

8. Mr. W. Campbell Moore, claimant's president, testified that this reduction in the number of articles to be furnished was with the

understanding that he would be given orders for 20,000 additional articles if the war continued long enough so that the Government would require this additional number.

9. An additional order for 10,000 hubs was given by letter from the Ordnance Department to claimant, dated October 18, 1918. By letter from the Artillery Section, Procurement Division, Ordnance Department, signed by Capt. E. M. Kerwin, dated November 16, 1918, claimant was notified to proceed no further with the additional order unless a formal order was sent it. No further order to proceed was given. Claimant incurred no expense for "indirect materials" in connection with the additional order.

10. A second formally executed supplemental contract dated November 21, 1918, was entered into, in which reference is made to the previous contracts. This contract provides for a decrease in the price of 25,003 hubs, in consideration of the Government permitting their manufacture from malleable iron hub caps instead of malleable steel caps, the unit price per set being reduced from \$13.95 to \$13.79 for the number to be manufactured of malleable iron.

11. On January 24, 1919, a third supplemental contract was entered into for painting 19,800 hubs with a coat of red paint. Claimant was by this contract also required to do certain experimental work in connection with changing the 56-inch standard artillery wheel hubs into the special 56-inch escort wheel hubs with 9¼-inch flange, the price for the experimental work being fixed at \$41.60 and for the painting at 10 cents per hub. This contract refers to the previous contracts, but makes no reference to the additional order for 10,000 hubs. The effect of the recitals in this contract is to show the existence at that time of a contract for the manufacture of 38,300 hubs.

12. The Detroit District Claims Board made an award October 28, 1919, making the following allowance to claimant:

(1) Unworked direct materials-----	\$14,057.72
(2) Indirect materials-----	30,618.90
(3) Worked direct materials-----	1,421.70
(4) Direct labor and overhead-----	3,496.31
(5) Commitments for material or services-----	
(6) Claims for other compensation-----	91,675.21
(a) Extra work-----	\$17,025.66
(b) Nondelivery-----	32,492.52
(c) Excess deterioration-----	42,157.03

the total award being \$141,269.84. An item award of \$91,751.66 was made, which latter amount has been paid to claimant, leaving a balance due claimant, according to such award, of \$49,518.18.

13. On April 13, 1920, the Ordnance Claims Board, after considering the claim, reduced the item for "indirect materials," allowed by the Detroit District Claims Board, from \$30,618.90 to \$19,264.08. The only matter in dispute before the Board of Contract Adjustment is as



to the correctness of the action of the Ordnance Claims Board in making such reduction.

14. The item "indirect materials" is made up entirely of tools, jigs, and fixtures of a permanent nature, and not such as were or would be consumed in the process of manufacture. These tools, jigs, and fixtures were taken over by the Ordnance Department upon payment by the Government to claimant of the item award allowed by the Detroit District Claims Board, and are now in possession of the Government.

15. The real matter in issue here is whether the cost of these "indirect materials," which claimant's president testified were purchased for the purpose of executing the original contract for 63,300 hubs, should be amortized on the basis of a contract for 38,300 hubs, as allowed by the Ordnance Claims Board; or on the basis of 48,300 hubs, as allowed by the Detroit District Claims Board.

16. Claimant's president testified that none of the "indirect materials" was purchased on the faith of the additional order for 10,000 hubs, and that no expense applicable to the additional order was incurred upon tools, jigs, and fixtures, but that all of the expense of such tools, jigs, and fixtures was incurred on the faith of the original contract for 63,300 hubs, and had all been incurred prior to the execution of the supplemental contract of July 10, 1918.

#### DECISION.

1. It is clear from the testimony that none of the expense involved in the items in dispute was incurred upon the faith of the order for the additional 10,000 hubs and wheel fasteners. It is equally well established that all of the expense relative to such item was incurred under the original contract for the machining of 63,300 hubs and wheel fasteners.

2. In the procurement order of May 9, 1918, claimant waived any demand or claim against the Government on account of the reduction of the order from 63,300 to 43,300. This partial cancellation was by mutual agreement with a representative of the Ordnance Department and accepted by claimant in writing.

3. By signing the supplemental contract of July 10, 1918, claimant waived any right it may have had to insist upon the amortization of the cost of the "indirect materials" upon any basis other than a contract for 38,300 hubs and wheel fasteners. This supplemental contract was the result of negotiations following a dispute as to whether the Government or claimant was responsible for the delay in the performance of the contract and at a time when the cancellation of claimant's contract, because of its alleged default, was impending.

4. The supplemental contract of July 10, 1918, may be construed as a more formal ratification of the waiver contained in the procure-



ment order and as an additional waiver on account of the further reduction of the number of articles to 38,300, and it is broad enough to include both.

5. The procurement order and the supplemental contract are so clear in their terms that there was no chance for claimant to be misled as to their legal effect, and especially is this true in view of the fact that negotiations looking to the cancellation, or at least a partial cancellation, of the contract had been pending for some time. If any portion of the expense item here in dispute had been incurred by claimant subsequent to July 10, 1918, on the faith of the order for the additional 10,000 articles, such portion might properly be a part of the expense of "indirect materials," which should be amortized; but since claimant voluntarily consented to the reduction in the order, it must be held that the terms of waiver contained in the procurement order and the supplemental contract preclude this Board from recommending amortization of the expense of "indirect materials" upon any basis other than a contract for 38,300.

6. Claimant's president testified that it was the understanding that if the war continued long enough he was to have other orders to cover the number of articles canceled; but even granting that such was the understanding, it can not aid claimant, for in signing the waiver he simply took a business chance and lost because of the early cessation of hostilities.

7. It may well be doubted whether under the terms of the supplemental contract of July 10, 1918, strictly construed, claimant is entitled to have the cost of the tools procured for the manufacture of 63,300 hubs amortized, or whether the amount to be amortized should not be limited to the cost of the tools necessary for the manufacture of only 38,300 hubs. However, since these tools, jigs, and fixtures have been taken over by the Government on the theory that claimant was entitled to have the cost of all the "indirect materials" purchased for use in the manufacture of the original number of hubs amortized, the consideration of this case is limited only to the question as to whether or not the cost of the tools taken over by the Government should be amortized on the basis of 48,300 hubs or on the basis of 38,300.

8. It is, therefore, the opinion of this Board that claimant is entitled, as held by the Ordnance Claims Board, only to an amortization of the cost of the "indirect materials" upon the basis of a contract for 38,300 hubs and wheel fasteners.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action.

Col. Delafield and Mr. Reilly concurring.

JUNE 29, 1920.

**Case No. 2737.**

*In re* **CLAIM OF YOUNG HESTER.**

- 1. TIME LIMIT FOR FILING CLAIM.**—The Board of Contract Adjustment will not consider a claim arising under the act of March 2, 1919, that was not filed within the time limit for filing claims as prescribed by the act, to wit, on or before June 30, 1919.
- 2. CLAIM AND DECISION.**—This claim for \$114 arises under the act of March 2, 1919, on an alleged implied agreement. Held, the Board of Contract Adjustment has no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, dated March 26, 1919, for \$114, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Claimant alleges that on June 10, 1918, he delivered to H. P. Roddie & Co., of Brady, Tex., agent of Chas. J. Webb & Co., of Philadelphia, Pa., 552 pounds of wool; that this wool was shipped for Government use in accordance with the terms of the Government regulations for handling the wool clip of 1918, as established by the Wool Division, War Industries Board, May 21, 1918; that under these regulations claimant should have received at least 80 cents per pound in the grease, which would have amounted to \$441.60, but that, by reason of improper grading, he received only \$327.60, there being due him the sum of \$114.

3. In reply to an inquiry from the Board of Contract Adjustment, claimant submitted an affidavit on June 14, 1920, in which he showed that this claim was not presented to any department, official, or agent of the Government prior to May 25, 1920.

**DECISION.**

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or

discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*“Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen.”*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763).

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 29, 1920.

**Cases Nos. 2763 and 2770.**

*In re* **CLAIMS OF HENRY KNOX AND O. O. McWILLIAMS.**

1. **TIME LIMIT FOR FILING CLAIM.**—The Board of Contract Adjustment will not consider a claim arising under the act of March 2, 1919, that was not filed within the time limit for filing claims as prescribed by the act, to wit, on or before June 30, 1919.
2. **CLAIM AND DECISION.**—These claims arise under the act of March 2, 1919, consisting of two separate items, aggregating \$839.19, based upon alleged implied agreement. Held, Board of Contract Adjustment has no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. These claims arise under the act of March 2, 1919. Each claimant has filed a statement of claim, Form B, under the provisions of Supply Circular No. 17, Purchase, Storage and Traffic Division, dated March 26, 1919, the claim of Henry Knox being for \$522.55 and the claim of O. O. McWilliams amounting to \$316.64, by reason of agreements alleged to have been entered into between claimants and the United States.

2. The two statements of claims are similar. Henry Knox alleges that on June 1, 1918, he sold 5,031 pounds of wool in the grease to S. D. Ranier, of Llano, Tex., for shipment to Farnsworth, Stevenson & Co., Boston, Mass., for which he was to receive payment in accordance with the terms of the Government regulations for handling the wool clip of 1918 as established by the Wool Division, War Industries Board, May 18, 1918; that under these regulations he should have received 60 cents per pound, which would have amounted to \$3,018.60, whereas he received only \$2,496.05, leaving a balance due him of \$522.55. O. O. McWilliams states that he sold 3,958 pounds of wool to Caldwell Palmer, of San Antonio, Tex., for shipment to Jeremiah Williams & Co., Boston, Mass., and that there was paid him \$2,058.16, whereas, under the Government regulations, he should have received \$2,374.80.

3. Each claimant has forwarded to this Board an affidavit showing that his claim was first presented to the Government in May, 1920.

## DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claim can be presented is plain and definite. Claims arising under this act presented after June 30, 1919, can not be considered by the Secretary of War nor by the Board of Contract Adjustment, which is in such cases the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and in so doing must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimants having failed to present these claims before June 30, 1919 (and for nearly a year thereafter), it is clear that the claims can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.

JUNE 30, 1920.

**Cases Nos. 2738, 2789, 2795, 2796, and 2803.**

*In re* **CLAIMS OF C. C. WILKINS, DAY CAGE, J. C. BUMGARDNER, J. E. & THEO. LYCKMAN, AND LEONARD & SMITH.**

1. **JURISDICTION.**—The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims.
2. **CLAIM AND DECISION.**—These five (5) claims for varying amounts are for losses suffered by claimants due to alleged improper grading of their 1918 wool clip. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. These claims arise under the act of March 2, 1919. Each claimant has filed a statement of claim, Form B, under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, dated March 26, 1919, for an amount alleged to be due on delivery of wool by reason of an agreement alleged to have been entered into between claimants and the United States.

2. It is alleged that the wool of each claimant was delivered to a wool dealer or commission merchant in the year 1918 in accordance with the terms of the Government regulations for handling the wool clip of 1918, as established by the Wool Division, War Industries Board, May 21, 1918; that this wool was delivered for the use of the Government; that claimants have not been paid the prices that should have been determined by the Government regulations; and that there is due them, by reason of improper grading, the following sums:

C. C. Wilkins.....	\$812. 43
Day Cage.....	2, 183. 36
J. C. Bumgardner.....	255. 10
J. E. & Theo. Lyckman.....	706. 08
Leonard & Smith.....	253. 97

3. Claimants have furnished the Board of Contract Adjustment with statements showing that these claims were not presented to any department, official, or agent of the Government prior to the spring of 1920.

## DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements, which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreement, Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War nor by the Board of Contract Adjustment, which is in such cases the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and in so doing must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimants having failed to present these claims before June 30, 1919 (and for nearly a year thereafter), it is clear that the claims can not be considered and that this Board is without power or authority to entertain same.

Col. Delafield and Mr. Eason concurring.



JUNE 30, 1920.

**Case No. Sales BCA-17.**

*In re* **CLAIM OF AERONAUTICAL EQUIPMENT (INC.).**

1. **JURISDICTION.**—The Secretary of War has no authority to adjust a claim under an informal contract not coming within the provisions of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under G. O. 103, for return of a deposit of \$42,025. Held, no jurisdiction.

Maj. Hill writing the opinion of the Board.

This is a claim under G. O. 103 to adjust a dispute under the terms of a contract between the claimant, the Aeronautical Equipment (Inc.), and the Salvage Board, Ordnance Department, by the terms of which the Government sold certain brass rods.

A hearing has been had upon this claim.

**FINDINGS OF FACT.**

1. On November 17, 1919, at the office of the Salvage Board, Ordnance Department, Washington, D. C.; an auction sale was held at which claimant was the highest bidder, \$0.1681 per pound being offered by claimant for all the brass rods, 5,000,000 pounds, more or less, of "1 inch and under in diameter and in mill lengths, approximately 50% in standard sizes."

2. On November 22, 1919, claimant wrote to the Salvage Board, Ordnance Department, a letter which embodied the agreement of said Salvage Board regarding the sale of these brass rods, which letter was in part as follows:

"We, the Aeronautical Equipment (Inc.), of the above address, agree to purchase five (5,000,000) million pounds, more or less, of brass rod, with the following approximate dimensions:

1" and under in diameter and in mill lengths, approximately fifty per cent (50%) in standard sizes.

located throughout the United States, at a price of sixteen dollars and eighty-one cents (\$16.81) per hundred pounds f. o. b. cars at point of present location.

"We hand you our certified check for 5% of the total sale price of the entire lot of material, said amount to be \$42,025, and the said sum is to remain as payment against the last lot of material to be shipped by the Government.

"We agree to have all of the material removed from the plants at which it is located (that is, 5,000,000 lbs., more or less) within 90 days from November 22, 1919.

"Substantial compliance with this provision shall be deemed to have been made provided we give you shipping instructions for the entire quantity at least 30 days before the expiration of the said 90 days.

"We agree to pay for the material shipped by certified check upon receipt of your invoice accompanied by the railroad bill of lading."

3. On November 22, 1919, the Salvage Board, Ordnance Department, accepted the terms in said letter in the following language:

"Be advised that this Board hereby approves the terms as set forth in your letter."

4. On April 6, 1920, the Salvage Board, Ordnance Department, canceled its contract with the Aeronautical Equipment (Inc.) by letter on the grounds that the Aeronautical Equipment (Inc.) had not lived up to the terms of its agreement.

5. This claim is presented by claimant for the return of the certified check for \$42,025, which was filed with its letter presenting a bid for the purchase of the above-mentioned 5,000,000 pounds of brass rods which is now being held by the Government to cover any damages which it may have suffered owing to the cancellation of the contract.

6. Claimant is not here seeking damages but is asking the return of this check deposited against the last payment under the terms of the contract entered into November 22, 1919.

7. It is alleged by claimant that they were unable to comply with the terms of the contract; that is, to give shipping directions for the entire quantity at least 30 days before the expiration of the said 90 days, due to the default on the part of the Government.

8. The specific instances of delay on the part of the Government as alleged by claimant are:

"1. Default in furnishing inventories and many errors in the inventories when finally furnished.

"2. Incorrect shipments on the part of the Government, instances being shipment of bronze instead of brass rods and mixing of sizes.

"3. Departure from the terms of the contract relating to method of payment.

"4. The Government's method of handling bills of lading through the Philadelphia office.

"5. Delays in shipping material after receipt of orders.

"6. Requiring the contractor to pay costs of packing and crating."

9. The Government did fail to deliver the material f. o. b. cars at point of present location. The railroad required that the rods be crated before acceptance and this crating the Government declined to do. Claimant did crate the rods and put them in such shipping condition as was required by the railroad. The Government also

failed, except in the case of the Baltimore district office to forward invoice accompanied by the railroad bills of lading before requiring payment. This was acquiesced in by the claimant in that it made payments before the receipt of such bills of lading. In each of the above two instances the claimant might have alleged a breach and refused to perform its contract, but instead it continued to perform under the contract.

10. It is alleged that through these delays claimant was thrown into bad repute amongst the trade and thus prevented from getting orders which would have resulted in shipping orders being given to the Government for the hauling of the material bought.

11. Col. Shurtleff, chairman of the Ordnance Salvage Board, testified that there were many delays in shipments on the part of the Government and that such delays were primarily due to the fact that there were embargoes either on the origin or point of shipment and in other cases it was attributed to the impossibility of getting cars to actually load it in.

12. At the expiration of time for the performance of this contract, on or about February 22, claimant had not complied with the contract in that claimant had not furnished the Government with shipping instructions for the entire quantity of material. At a conference in Washington during the latter part of February claimant requested an extension of time. This extension was given by Col. Shurtleff upon the express agreement that claimant would furnish a bond, which bond was never furnished by claimant. This matter was held in abeyance until April 6, 1920, during all of which time claimant had not complied with its agreement to provide a bond for the extension of its contract.

13. Col. Shurtleff on April 6 wrote claimant as follows:

"You are advised that the Ordnance Salvage Board is to-day cancelling its contract with you because you have not in any way lived up to the terms of the agreement."

14. Upon receipt of this letter claimant asked that the \$42,025 deposited as aforesaid be returned, which request was refused. Claimant now asks the return of this \$42,025.

#### DECISION.

1. It is the opinion of this Board that the Government has not fully complied with the terms of the contract, but has failed to deliver the material f. o. b. cars at point of present location and has failed to forward invoice accompanied by the railroad bill of lading before requiring payment. Claimant waived, at least so far as performance is concerned, such breach and continued to perform under the contract.

2. Claimant failed to comply with the terms of the contract in that it failed to furnish shipping instructions for the total quantity of material within the time specified by the contract.

3. No regulations covering the form of contract for the sale of surplus property have been prescribed by the Chief of Ordnance, pursuant to section 6854, Compiled Statutes. This contract is therefore not a contract within the exceptions to section 3744, Revised Statutes, but is an informal contract.

4. The power of the Secretary of War to settle contracts not coming within the provisions of the act of March 2, 1919, by agreement with the contractor or to adjust disputes arising thereunder rest wholly upon the existence of the contract itself, and can not be exercised where the contract has been fully executed by performance, or terminated by breach, cancellation, or otherwise.

5. It is the opinion of this Board that the function of the Secretary of War extends only to the delivery of the subject matter of the contract; that the adjustment of the money payments under the contract is not the function of the Secretary of War, but pertains to the powers of the Treasury Department or of the courts.

6. This Board is therefore without the authority to grant the relief sought by claimant. The claim is accordingly denied.

Mr. McCandless and Mr. Tabb concurring.

JUNE 30, 1920.

Case No. 1986.

*In re* CLAIM OF THE BIGGAM TRAILER CORPORATION.

1. **FORMAL CONTRACT—CLAIM FOR EXTRA COST—SUPPLEMENTAL AGREEMENT.**—Where claimant was manufacturing certain articles under a formal contract, and amendments thereto, at fixed prices, and entered into a supplemental contract containing new provisions as to delivery but not changing the prices as fixed by such amendments to the contract, claimant is only entitled to receive the amount fixed by its contract as amended. Having agreed to the amount of compensation claimant is not entitled to an additional amount claimed to be due on account of extra cost incurred in manufacturing the articles.
2. **CLAIM AND DECISION.**—Claim under the act of March 3, 1919, for \$13,626.54, based upon an implied agreement contract. Held, claimant is not entitled to relief.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This Board finds the following to be the facts:

This is a claim for \$13,626.54, and comes before this Board on appeal from the Air Service Claims Board under the terms of Supply Circular No. 46, Purchase, Storage and Traffic Division, but, in fact, claim is a Class B claim under the provisions of Supply Circular No. 17.

1. The Biggam Trailer Corporation was a corporation engaged in the manufacture of trailers at Corrona, Mich., and, under date of February 4, 1918, received procurement order No. 90598 for trailers, as follows:

Item:

1. 500 trailers, one-ton, two-wheel, Aviation, in accordance with Signal Corps specifications and Motor Transportation Section, Signal Corps drawings Nos. A-1 to A-24, inclusive, A-20 and A-31; B-1 to B-10, inclusive; C-1 to C-5, inclusive, C-7 and C-12; D-1, D-3, and D-12; F-1 and F-2; G-1 to G-5, inclusive; and G-7 and G-8 blue prints. Price per trailer, including pressed-steel disc wheels, ridge pole, and bracket, \$420.25----- \$210,125.00

NOTE.—250 to be delivered in March, 1918; 250 to be delivered in April, 1918.

2. This was followed by contract No. 2801 dated the 8th day of February, 1918, which was duly executed by the claimant and the

United States Government, by which contract order No. 90598 was made a part thereof. By letter dated March 28, 1918, from Edwin S. George, lieutenant colonel, Signal Corps, the foregoing contract was amended as follows:

"Your order for five hundred (500) trailers has this day been amended as per specifications which will be forwarded to you within one week or ten days. For your information, however, would advise that a new axle is necessary, also steel disc wheels fitted with solid tires, and the body has been changed to a cargo body, approximately 12' long, 6' 9'' wide and 2' side and front and panels and tail gate.

"In computing the cost, it has been determined by this department and the representative of Flint & Company that the price should be \$428.62."

3. On April 25, 1918, O. R. Ewing, First Lieutenant, A. S. A., Signal Corps, forwarded claimant a letter which is apparently a verification of the foregoing letter dated March 28, 1918, as follows:

"With reference to Signal Corps order No. 90598, placed with you on February 4, 1918, for five hundred one-ton, two-wheel Aviation trailers, you are advised that same is hereby amended as follows:

(a) Item:

1. 500 trailers 1-ton, 2-wheel, Aviation, in accordance with Signal Corps specifications herewith enclosed @ \$428.62

Total ----- \$214, 310. 00

(b) Delivery note:

To be delivered in equal quantities during the months of June and July, 1918.

"It is to be noted that enclosed specifications supersede those of original order and that the price per trailer is increased accordingly. All changes of price per trailer, specifications, and deliveries apply to the entire five hundred trailers of this order."

4. On June 7, 1918, M. J. Kennedy, second lieutenant, A. S. Sig. R. C., advised claimant as follows:

"It is advised that our contract department has been requested to amend above order to the extent of increasing the price of the five hundred (500) cargo trailers covered by this order from \$428.62 each to \$436.72 per trailer, this additional \$8.10 to cover the following items which were not included in the original specifications:

Drilling the letters "A. S." in gusset plate-----	\$0. 25
Additional wheel assembly labor-----	. 75
Pressing on tires-----	. 50
Leg chains-----	. 60
Flooring irons-----	4. 50
Metal-bound tool box-----	2. 50
Total-----	9. 10
Allowance for reduction in cost of wheels-----	1. 00
	<hr/> 8. 10

"Several of these items, however, are incorporated in the specifications as written to-day. It will be noted that two amendments to specifications will have to be made to completely cover this additional charge, namely:

"(a) Paragraph 20 is changed to read '1 box 16" high x 15" wide x 54" long, outside measurements, drawing C-46, made of 13/16" dressed long-leaf pine, positioned across the drawbar in front of body as shown on assembly drawing. This box is metal bound and braced and is provided with hardware and means of attachment to the frame, all as shown and described on above drawing.'

"(b) There will be added to paragraph 21 the following: 'By two chains secured to the frame as shown and described on drawing C-45.'

"Formal amendment to specifications and notification of increase in price will be received by you from our contract department some time within the next week or ten days."

5. On June 11, 1918, O. R. Ewing, first lieutenant, A. S. Sig. R. C., of contract department, verified the foregoing letter of June 7, 1918, and notified claimant of the change in price and specifications as follows:

"With reference to Signal Corps order #90598, placed with you on February 4, 1918, for 500 trailers:

"The following amendments of specifications are hereby made in order to completely cover an additional allowance, namely:

"(a) Paragraph 20 is changed to read '1 box 16" high x 15" wide x 54" long, outside measurements, drawing C-46, made of 13/16" dressed long-leaf pine, positioned across the drawbar in front of body as shown on assembly drawing. This box is metal bound and braced and is provided with hardware and means of attachment to the frame, all as shown and described on above drawing.'

"(b) There will be added to paragraph 21 the following: 'By two chains secured to the frame as shown and described on drawing C-45.'

"In view of increased price on 500 cargo trailers covered by order #90598 from \$428.62 to \$436.72 per trailer, said order is hereby amended to read as follows:

Item:

1. 500 trailers. to be manufactured in accordance with specifications, at \$436.72 ea-----	\$218,360.00
--	--------------

"This increases the order in the amount of \$4,050.00, making a new total of \$218,360.00."

6. On November 22, 1918, O. R. Ewing, captain, A. S. A. P., directed the following letter to the claimant:

"With reference to order No. 90598, placed with your company on February 4, 1918, for 500 trailers, please be advised that order is hereby amended to include the following:

(a) Supplying of three (3) ridge poles instead of one (1), as originally ordered, at \$3.00 each for five hundred (500) trailers---	\$3,000.00
(b) Re-forming of lunetts required by change in design, 98¢ each, five hundred (500) trailers-----	480.00
(c) Two hundred and fifty (250) crates at \$75.00 per crate (2 trailers to be included in each crate)-----	18,750.00

"It is understood that instructions to discontinue crating of this order have already been given to your company. Therefore, item



(c), which provides for these crating charges, will be subject to further amendments when it is actually ascertained the amount of work which has been done thereunder."

7. Again on February 19, 1919, F. D. Schnacke, captain, A. S. A. P., forwarded the claimant the following letter:

"Reference is made to the above order placed with your company February 4th, 1918, for 500 trailers.

"It is the understanding of this office that you have furnished extra work on order #90598, and as this extra work has the approval of this office, this order is amended to include the following item:

Item:

Making dowels and plugging lashing-hook holes in 1,000 rear-end boards, for the job----- \$68. 82

8. All of the foregoing letters were in the nature of amendments to the original contract dated February 8, 1918, under which original contract and the letters hereinbefore quoted the claimant proceeded to make up and deliver to the Government 500 trailers for which claimant has been paid the sum of \$240,658.82 in accordance with the terms of the original contract and the amendments thereto.

9. By formally executed supplemental contract No. 2801-1, dated the 11th day of October, 1918, and described as "First Supplemental Contract," the United States agreed to accept from the claimant 160 of the said trailers which the claimant agreed to store, the Government agreeing in turn to pay as follows:

"ARTICLE II. The contractor agrees to furnish the Government proper receipts covering said accepted trailers, showing ownership thereof in the Government, and the Government will, upon presentation of proper vouchers, pay for said accepted trailers at the rates specified in original contract, less twenty-five per cent (25%) of the purchase price thereof, which latter amount shall be paid when the trailers have been packed and put on board cars by the contractor."

Article VI of the said contract provided:

"All terms and provisions of said original contract, #2801, dated February 8, 1918, not hereby specifically modified or amended, shall be and remain in full force and effect."

10. This first supplemental contract was in turn followed by supplemental contract No. 2801-2, dated November 9, 1918, described as "Second Supplemental Contract," whereby the Government agreed to accept 250 trailers from the claimant, Article II thereof providing as follows:

"The contractor will furnish the Government proper receipts covering said accepted trailers, showing ownership thereof in the Government, and the Government will, upon presentation of proper vouchers, pay for said accepted trailers at the rates specified in original contract No. 2801, less twenty per cent (20%) of the purchase price thereof, which latter amount shall be paid when the trailers have been packed and put on board cars by the contractor."

Article VI thereof provided:

"All terms and provisions of said original contract, No. 2801, dated February 8, 1918, and said Supplemental Contract No. 2801-1 dated October 11, 1918, not hereby specifically modified or amended, shall be and remain in full force and effect."

11. Claimant proceeded to complete the balance of the trailers, and finally delivered, along in November, 1918, the 500 trailers for which it had contracted, and received from the Government the full sum of \$240,658.82, the said sum being in accordance with the rates in the said original contract and the amendments thereto, as represented by letters hereinbefore quoted.

12. Claimant has had two hearings on this matter, and at the first and second hearing withdrew the item for strips placed on the body of the trailer, and by an affidavit filed after the last hearing has summarized his claim, showing the following costs resulting from the changes in the original contract:

7 stake pockets, @ 35¢ each-----	\$2. 45
7 stakes, @ 26¢ each-----	1. 82
2 corner irons on each trailer-----	. 43
66 additional carriage bolts, @ 1¼¢-----	. 82
7 lashing hooks, @ 13¢-----	. 91
14 extra bolts for lashing hooks, @ 1¢-----	. 14
Additional cost for lumber per trailer-----	. 85
Extra cost for wheels per trailer-----	6. 50
Extra cost for axles per trailer-----	14. 00
Items allowed by second amendment to contract-----	8. 10
<hr/>	
Total extra costs per trailer-----	36. 02

13. And that there has been allowed the sum of \$8.37 on the first amendment and on the second amendment \$8.10, and that there was a saving on the change of tires from pneumatic to solid of \$1.12 per trailer, thereby making a total of \$17.59 of allowances made and paid and saving effected, which leaves the sum of \$18.43 per trailer due the claimant which has not been paid.

14. The claim as originally filed was for \$6.50 per pair for 500 wheels, or a total of \$3,250, and a loss of \$16 per axle, occasioned by the change of axles from 1 ton to 1½ tons, or a total of \$8,000; and the further sum of \$381.23 being obsolete material left in the hands of the claimant due to the change in specifications; and the further sum of \$165.31 the extra material occasioned by the change of specifications.

#### DECISION.

1. This Board is of the opinion that claimant has failed to produce any evidence that would justify it in granting claimant any

relief. The contract dated February 8, 1918, specifically provided what articles claimant should manufacture and what amount he would be paid. The first amendment dated March 28, 1918, also specifically stated the amount that should be paid for the changes therein referred to, which changes definitely mentioned the wheels and axles. This said amendment having therein incorporated this pertinent statement:

"In computing the cost it has been determined by this department and the representative of Flint & Company that the price should be \$428.62."

The evidence has disclosed that Flint & Co. was a representative of claimant, so that at the time that the change of the wheels and the axles was agreed upon the increased price of \$428.62 was mutually agreed upon by the representative of the claimant and the United States Government as the compensation that should be allowed for said changes including wheels and axles. The amendments that followed, dated April 25, June 11, November 22, and February 19, all specifically set out the amounts that should be paid to the claimant on account of the changes incorporated in the said amendments. Claimant never objected to any of these changes or to the allowance made under and by the said amendments but proceeded to complete his contract and at the price agreed upon in the original contract as amended by the amendments heretofore referred to. Not only this, but when claimant came to make deliveries to the United States Government he entered into supplemental contracts, the first of which was No. 2801-1, dated October 11, 1918. Article I, among other things, specifically provided:

"Upon such inspection and acceptance by the Government, and partial payment therefor as hereinafter provided, title to such trailers as are accepted and so paid for will immediately pass to the Government."

Not only in this article does the claimant agree that title shall be wholly in the Government, but in Article V agreed:

"The contractor will give due notice that all such trailers accepted and partially paid for are the property of the Government and will not suffer or allow any lien or encumbrance to attach thereto."

And in Article VI contractor further agrees:

"All terms and provisions of said original contract, #2801, dated February 8, 1918, not hereby specifically modified or amended, shall be and remain in full force and effect."

2. By contract No. 2801-2, dated the 19th day of November, the contractor agreed in Article I, among other things:

"Upon such inspection and acceptance by the Government and partial payment therefor as hereinafter provided, title to such

trailers as are accepted and so paid for will immediately pass to the Government."

3. The provisions of Article V and VI of the contract of the 19th of November, 1918, being practically the same as those in Article V and VI of the contract of October 11.

4. These two supplemental contracts were executed for the purpose of allowing the claimant to make deliveries to the United States Government before receipt of shipping orders and to allow him to collect on account of the said deliveries certain sums of money. The articles hereinbefore quoted show it was the intention of the claimant, upon payment to it in accordance with the terms of the said supplemental contract of the sums therein described, to pass to the United States Government the absolute and complete title to the trailers so delivered and paid for by the Government, and it is worthy of note that these supplemental contracts were executed and signed by the claimant and the United States Government long after the changes or amendments were made to the original contract, and after the trailers had been made up under the said original contract and the so-called amendments thereto.

5. The effect of these two contracts was to pass title to the Government upon the payment of the prices therein referred to (which were the prices set forth in the original contract and the so-called amendments thereto). These two contracts of themselves were entirely sufficient to pass title to the Government of all the trailers in question, and the claimant by signing the same has waived any and all right to any further or additional payment. It is not reasonable to presume that if the claimant had had any further or additional claim against the Government it would have signed the two supplemental contracts, but it is reasonable to believe that if the claimant had had any further or additional demands against the Government it would have taken them up and incorporated them into the two supplemental contracts in question. If the Biggam Trailer Corporation was not satisfied with the terms set forth in the amendments the time to make known that objection was during the negotiations or the performance of the contract and not to wait until long after the contract had been completed by performance and payment. The mere fact that claimant might have made more money on its contract by inserting in the various amendments a larger sum does not justify this Board in going contra to the plain provisions of the contract and the amendments thereto. These contracts are positive and certain and there is no ambiguity that is necessary to be explained by oral testimony.

6. In the decision of this case it is competent to comment on the acts of the parties at and during the time of the entering into of the

original contract and the amendments thereto as well as the action of the parties during the performance of the contract. At no time until long after the completion of the contract and the payment to claimant of the amount set forth in the original contract and the amendments thereto was claimant heard to complain. At the time the amendments were entered into the contractor was represented, and the first amendment specifically sets forth that the price therein stated was arrived at by agreement between its representatives and the Government. At no time do we find the contractor objecting to any amendment or to any price, but we find him completing his contract and acquiescing in the various changes of specifications and price without protest. This, to our minds, clearly indicates that the amendments and the prices therein set forth were entirely satisfactory to the claimant and represented the actual agreement between it and the Government, and claimant is bound by the same.

8. The Board in reaching its conclusion is not unmindful of the affidavits that have been filed by Col. George and Mr. Biggam, nor has it neglected to give due consideration to the testimony of Col. George and Mr. Biggam at the first hearing of this claim, and desires to specifically direct attention to the fact that at no place in either the testimony of Col. George or Mr. Biggam, or in the affidavits filed by them, has either one of these gentlemen stated that there was any promise made to the Biggam Corporation that it would be paid any additional or further sum for any work done by it, other than that set forth in the contract and the amendments thereto.

9. For the foregoing reasons all relief asked for by the claimant is denied.

#### DISPOSITION.

A copy of this decision will be furnished the Air Service Claims Board for its information and guidance.

Mr. McCandless and Maj. Farr, concurring.

JUNE 30, 1920.

**Case No. 2731.**

*In re* **CLAIM OF THE CENTRAL CONSTRUCTION CO.**

- 1. REPAIRS NOT AUTHORIZED BY CONTRACT.**—Where the officer in charge of construction under a validly executed contract for a gas shell filling plant directed the contractor to furnish labor and materials for the repair of certain houses, not on the Government reservation, for the occupancy of Army officers, the contractor can not be reimbursed its costs so incurred, since there was no authority for ordering such work under the contract.
- 2. ATTORNEYS' FEES.**—Where a construction contract contains no provision authorizing the employment of attorneys by the contractor at the expense of the Government, the contractor can not be reimbursed for payment of such fees even though the attorneys' services resulted in a saving of money to the Government. Nor is it the duty of the Government to pay attorneys' charges which have been incurred in the defense of a groundless suit against the contractor even though the occasion for the suit may have been the action of agents of the Government in arresting a certain person.
- 3. CLAIM AND DECISION.**—Claim presented under G. O. 103 for \$7,586.48, based upon a validly executed contract for the construction of a gas shell filling plant at Gun Powder Neck, Md. Held, claimant is not entitled to recover.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with G. O. No. 103, War Department, 1918, and is for \$7,586.48, under the following circumstances:
2. The claimant is a corporation located at Harrisburg, Pa. On November 23, 1917, it entered into a formal contract with the United States for the construction by it of a gas shell filling plant at Gun Powder Neck in Maryland. The contract provided that the claimant should receive its costs of construction plus a profit of 10 per cent. In August, 1918, the claimant agreed to a modification of the contract and to accept for its services the payment of a fee of \$250,000.



## 3. The claim consists of three items:

First. For labor and materials furnished in connection with the repair of cottages at Otter Point-----	\$6, 083. 83
Second. Attorneys' fees paid the firm of Willis & Willis, Baltimore, Md., for legal services in connection with the settlement of disputes with the Dorsey-Miller Co-----	1, 000. 00
Third. Amount paid Willis & Willis of Baltimore for legal services in connection with the defense of a suit brought by West against the claimant on the ground that the plaintiff had been unlawfully arrested by Government officers-----	505. 65

4. *Item 1.*—The land which the United States acquired consisted of a peninsula known as Gunpowder Neck, with Chesapeake Bay at one end and the tracks of the Pennsylvania Railroad on the other, and with the Bush River on one side and the Gunpowder River on the other side. A number of contractors were engaged in erecting buildings on Government land and many million dollars were expended. Lieut. Joseph H. Portugal was the officer in charge of the performance of the claimant's contract. At his direction roads were built and repaired by the claimant both inside and outside of the Government reservation. At his direction also some of the farmhouses on Gunpowder Neck were repaired by the claimant and put in condition for occupancy. For all work performed by the claimant in connection with these matters payment has been made.

It appears that in February, 1918, there were no quarters on the Government reservation that were suitable for the use of officers. At Otter Point, distant about one-half mile from the reservation and much more conveniently located to the places where construction was going on than any of the farmhouses on the reservation, were six cottages belonging to a Mr. Jones. Some kind of an arrangement, the details of which are not stated, was made by Lieut. Portugal, or under his direction, for the use of the six cottages at Otter Point by officers of the United States. Lieut. Portugal and Capt. Coleman, who was acting under him, directed the claimant corporation to procure the materials and furnish the labor necessary for putting the cottages in repair suitable for their occupancy by United States officers. The claimant supplied lumber for the repair of the cottages, plumbing for running water, pipe for the disposal of sewage, as well as paint and whatever else was necessary to place the cottages in good habitable condition. Some of the hardware and other materials used in the cottages was ordered by Lieut. Portugal or Capt. Coleman in Baltimore and later paid for by the claimant company as an expenditure under the provisions of its contract. The claimant did not know that these cottages were outside of the Government reservation or that they belonged to a private individual, and it furnished the labor and materials at the direction of Lieut. Portugal and Capt. Coleman in the belief that in so doing it was acting under orders of



Government officers who were charged with the duty of supervising the performance of the Government contract. Some of the material used in the repair of the cottages had been purchased and stored by the claimant corporation for use in other buildings inside of the reservation. It was directed by Lieut. Portugal to use this material to the amount of about \$2,000 in the repair of the Otter Point cottages. The claimant was paid by the United States the cost of this material, but later its cost was deducted from the amount due the claimant for the reason that the materials were used in the repair of buildings which did not belong to the United States.

6. *Item 2.*—After the claimant had been engaged for some time in the performance of its contract of November 23, 1917, the Government decided to have a dock erected on the reservation. It was decided that the dock should be built by the Dorsey-Miller Co., but instead of the Government entering into a contract directly with the Dorsey-Miller Co. it was arranged that the claimant corporation should enter into a contract with the Dorsey-Miller Co. as its subcontractor and should pay that concern its costs plus 10 per cent and should receive reimbursement from the United States under the contract of November 23, 1917. The work of the Dorsey-Miller Co. was not satisfactory to the Government officers, and the claimant corporation was requested to arrange with that concern for a discontinuance of its operations and for the taking over of its materials and equipment and for the completion of the dock construction by the claimant corporation instead of by the Dorsey-Miller Co. The claimant company undertook to accomplish this result as requested, but in making settlement with the Dorsey-Miller Co. the claimant believed that that concern was charging considerably more than it was entitled to for the amount of work which it had accomplished and for the equipment and materials which it had supplied. The Government auditor at the arsenal appears to have agreed with this conclusion. The claimant corporation engaged the firm of Willis & Willis, of Baltimore, to see if a settlement could not be made with the Dorsey-Miller Co. on a basis much more favorable to the Government than had been proposed. As a result of the efforts of Messrs. Willis & Willis the Dorsey-Miller Co. agreed to accept in full settlement of its claim a sum about \$8,000 less than it had first demanded. Payment was made by the United States to the Dorsey-Miller Co. of the amount that had been agreed on in settlement. For legal services in connection with obtaining this settlement Messrs. Willis & Willis charged the claimant corporation the sum of \$1,000. The contracting officer at the arsenal decided that the charge for legal services under all the circumstances was a proper charge to be made against the contract, and signed a voucher in the usual form re-

quiring payment to be made to the claimant of this item. The Auditor for the War Department has, however, refused to make payment. The claimant contends that under the provisions of its contract with the United States the decision of the contracting officer is final and that the Auditor for the War Department has no legal right to refuse payment.

7. *Item 3.*—The several contractors who were engaged in construction work at Edgewood Arsenal were often in competition with each other for laborers. An objectionable practice grew up of laborers who had agreed to work for one contractor being persuaded on arrival at the arsenal to enter the employ of one of the other contractors. One of the men who was active in promoting this sort of thing was named West. The Government determined to put a stop to this practice. Officers under the direction of the United States Department of Justice were sent to Edgewood, and on one occasion finding West intoxicated at the railroad station had him arrested on the charge of drunkenness and disorderly conduct. Thereafter West sued the Central Construction Co. for \$10,000 for false arrest. The claimant engaged Messrs. Willis & Willis to defend it, and they were successful in having the suit dismissed. Their charge for legal services in this connection was \$505.65. A voucher similar to that mentioned under item 2 had been executed at the direction of the contracting officer, but payment has been refused.

#### DECISION.

*Item 1.*—The claim comes before us as for money due for materials furnished and labor performed under the provisions of the contract of November 23, 1917. We are unable to find any provision in that contract which would cover expenditures on houses belonging to an individual and in which the Government had no interest. It is not controverted that the claimant corporation expended \$6,083.33 in the repair of Mr. Jones's cottages at Otter Point, or that in so doing it was acting under the direction of the officers of the United States who were charged with the duty of supervising the operations of the claimant corporation, nor is it questioned that the claimant corporation did this work in good faith and in the belief that the cottages were Government property, or that the work done was similar to what was done by the claimant on the Government reservation at the direction of Lieut. Portugal, for which payment was made without hesitation.

Although the facts just stated are conceded, there remains the formidable objection that it was not within the power of Lieut. Portugal and the other officers of the United States to impose obliga-

tions on the Government by issuing orders for the repair of houses which did not belong to the United States. The power of these officers was limited to requiring the performance by the claimant of its undertakings under the contract of November 23, 1917. That contract does not provide for reimbursement to the claimant of expenditures made by it in making tenantable Mr. Jones's cottages at Otter Point. Lieut. Portugal's orders can not enlarge the scope of a formal contract. It follows that the claimant is not entitled to payment of the sum asked for under item 1.

If the claim is considered as being brought under the provisions of the act of March 2, 1919, there are similar obstacles which prevent the granting of relief.

The officers who ordered the installation of bathtubs, running water, plumbing, and sewer systems in Jones's cottages and directed that they be painted and renovated did not intend to make an agreement with the claimant by which the Government should be under obligations to pay over \$6,000.

They intended that Jones should pay the claimant for its work on Jones's cottages. Jones was to be reimbursed out of rent paid to him by the officers. It was at first contemplated that only about \$250 should be laid out in the repair of the cottages, but as has happened in other instances, after repairs are once begun one thing leads to another, and in the end a large sum is found to have been expended.

If Lieut. Portugal or Capt. Coleman had intended to enter into an agreement with the Central Construction Co. which provided that the Government expend over \$6,000 in the repair of Jones's cottages, there would be no escape from a determination that such an agreement was beyond their power to make. It would result in Jones having permanent improvements made to his cottages at Government expense for which he was to pay nothing, but, on the contrary, by reason of the improvements he was to receive increased rents. The claimant believed that it was doing work on property that belonged to the United States, and until the work was nearly finished did not know that the cottages belonged to Jones and were outside the Government reservation. This demonstrates the good faith of the claimant, but it also negatives the contention that a separate informal agreement was entered into for the repair of Jones's cottages.

*Item 2.*—The services of Messrs. Willis & Willis in arranging for a settlement of the claim of the Dorsey-Miller Co., seem to have been beneficial to the Government and to have resulted in the payment by the Government of a sum considerably less than that at first demanded. It appears also that the claimant in all its dealings with

the Dorsey-Miller Co. was acting in a real sense as an agent of the United States, although technically the Dorsey-Miller Co. was a subcontractor of the claimant, yet there is no evidence that the claimant was specifically authorized to employ attorneys in the matter of making adjustment of the Dorsey-Miller Co.'s claims. Under the terms of the contract of November 23, 1917, we are unable to find a liability on the part of the United States to this claimant for the charges of attorneys. There is no provision in the contract which justifies the employment of attorneys at the expense of the United States, and in the absence of special authorization by the Government we are not warranted in finding that the claimant is entitled to reimbursement for the amount paid to its attorneys under the circumstances stated.

*Item 3.*—The action of West against the Central Construction Co. was a groundless one. On the evidence before us, West had no cause of action against the claimant corporation. It is not the duty of the United States to pay attorneys' charges which have been incurred in the defense of groundless suits against its contractors. It is not material that the occasion for the suit may have been the action of officers of the United States.

For the reasons stated, it is our opinion that reimbursement should not be made to the claimant in respect to any of the three items upon which its claims is based.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, for appropriate action.

Mr. McCandless concurring.

JUNE 30, 1920.

**Case No. 456.**

*In re* **CLAIM OF CHALMERS KNITTING CO. (RECONSIDERATION).**

1. **ADJUSTMENT OF AGREEMENT—RELEASE.**—On a claim based on an agreement to buy "seconds" at a discount, such "seconds" to apply on the total number of articles to be manufactured under the contract, relief must be denied where claimant has not only released the Government from all claims under the contract but has also been compensated for the small portion of the contract which had not been completed at the time of its suspension.
2. **CLAIM AND DECISION.**—On April 24, 1920, this Board granted relief in ten (10) claims presented by claimant, including this claim. It appears that claimant had already been granted relief and had executed a release in this case. It is therefore held on reconsideration that claimant is not entitled to relief.

Mr. Henry writing the opinion of the Board.

**FINDINGS OF FACT.**

1. On April 24, 1920, this Board rendered a decision in the cases of Chalmers Knitting Co., Nos. 451 to 460. It was then held that in connection with the 10 different contracts with claimant for the manufacture of army underwear there were oral agreements under which "seconds" were to be received by the Government at a discount of 25 per cent on the heavyweight goods and 15 per cent on the lightweight goods. Ten separate certificates "C" and documents for such agreements were issued.

2. By indorsement of June 23, 1920, the Claims Board, Director of Purchase, has asked this Board for instructions as to what it should do under the certificate "C" and the document in case No. 456 in view of certain facts before such Claims Board which had not come to the attention of the Board of Contract Adjustment at the time it rendered its decision on April 24.

3. It seems that on May 19, 1919, this same claimant filed a class A, Dent bill claim with the Claims Board, Office Director of Purchase, based upon original proxy-signed contract No. 3844-N, dated June 15, 1918. This Claims Board, Director of Purchase, issued a certificate, Form C, and thereafter the zone supply officer negotiated a fair and equitable settlement, in amount \$34.48, covering all claims arising out of suspension of the original contract after the armistice. This settlement was afterwards written into a statutory award which

was approved by the Claims Board, Director of Purchase, and the War Department Claims Board.

4. In connection with this adjustment, and on May 15, 1919, the claimant executed the following release:

"In order to effect a settlement with the U. S. Government on contract No. 3844-N for 462,000 ribbed undershirts, and in view of the fact that we have not supplied ourselves with all the necessary materials to complete the said contract (as more specifically set forth in the questionnaire submitted to the Clothing & Equipage Division), we hereby agree to accept the terms set forth in plan C outlined in a communication from the office of the Quartermaster General to the zone supply officer, whereby we are to receive a flat payment of \$.03½ per each item canceled, to wit, 490 undershirts, amounting to \$17.15, plus the following allowances for the material that we have on hand and purchased solely in connection with the performance of the above-mentioned contract:

312 lbs. Middling cotton at \$.037 plus \$.28 handling charges, amounting to-----	\$11.82
Sewing thread amounting to-----	1.23
6½ lbs. of sleeves partly finished at \$.6578 per lb., amounting to-----	4.28

altogether amounting to \$34.48 in complete settlement of the above-mentioned contract, and in consideration of the above payment to us of the last-named amount, to wit, \$34.48, we hereby waive all claims of whatsoever nature that we may have against the Government on contract No. 3844-N.

"CHALMERS KNITTING COMPANY,  
"By THEO S. DUTCHER, *Vice Pres.*"

"B. M. CLARK

"D. A. BURNAP,

"*Witnesses.*"

5. It further appears that contract No. 3844-N, contained the following provision:

"7. *Rejected goods.*—This award is made with the express understanding and provision that the Government may purchase any goods which may be rejected under this award and contract, at a reduction in price to be agreed upon and fixed by the Government and the contractor, and in the event that the Government and the contractor fail to agree upon a price for such rejected goods, then the price shall be fixed by the Price Fixing Committee of the War Industries Board. In the event that any rejected goods are so purchased, such goods shall then apply toward the full amount of goods to be supplied under this award and the contract, and in that respect alone. This award is made with the further understanding and provision that the Government shall be offered all goods rejected hereunder before such rejected goods can be disposed of elsewhere."

#### DECISION.

1. This Board did not have knowledge of the filing of the class A claim and the award made under it, and therefore did not consider the effect of the release contained in the award.



2. The terms of the release are broad. They are, "We hereby waive all claims of whatsoever nature that we may have against the Government on contract No. 3844-N."

3. Such a release might, however, be held not to release a claim under a separate and independent supplemental agreement. But in view of the wording of paragraph 7 of the principal contract in this particular case, as above quoted, we are constrained to hold that the supplemental agreement was not distinct and independent. The clause as to rejected goods gave the Government an option to take all "seconds" rejected under the contract. It was subsequently orally agreed between the parties that they were to be taken at a discount of 15 per cent. While it is possible for the exercise of an option under one contract to constitute a separate and distinct agreement, it is believed that in this case the exercise of the option and the fixing of the price was by way of operation under the principal contract, because of the way the option is worded. It was provided "In the event that any rejected goods are so purchased, such goods shall then apply toward the full amount of goods to be supplied under this award and the contract." That indicates that the "seconds" which were to be accepted were to be applied to the principal contract. It follows that the release of "all claims of whatsoever nature" under contract No. 3844-N releases the Government from any obligation it may have been under to take "seconds" under that contract or under the option therein found.

4. Also there is an additional reason why claimant can not recover for "seconds" which may have been rejected under contract No. 3844-N. It appears that the contract called for 462,000 ribbed undershirts. All of them were delivered and paid for except 490, and claimant received under the award which it accepted compensation for the loss on materials provided for 490 undershirts. Therefore, claimant has received compensation for the full number of undershirts, and it is impossible to apply any "seconds" which may have been rejected under the contract to the contract as provided by paragraph 7. It follows that regardless of the question as to whether the waiver of all claims under the contract released a claim under the option, that compensation can not be made for "seconds" because they can not be counted in the total number of undershirts as the contract requires.

#### DISPOSITION.

This case will be returned to the Claims Board, Director of Purchase, with instructions that the certificate "C" and document issued in this claim should be withdrawn.

Mr. McCandless concurring.



JUNE 30, 1920.

**Case No. 295.**

***In re* CLAIM OF THE CLEVELAND MACHINERY & SUPPLY CO.  
(REHEARING.)**

1. **JURISDICTION.**—The Secretary of War has no jurisdiction over a claim under a validly executed contract which has been terminated by completion. He is also without jurisdiction over a claim for remission of liquidated damages which have accrued to the United States. (Citing Hawthorne case, 11 Comptroller's Decisions, 113.)
2. **CLAIM AND DECISION.**—Claim was made under G. O. 103 for the remission of liquidated damages amounting to \$41,789.55, deducted by the Government because of claimant's failure to make deliveries in accordance with the terms of a validly executed contract for gun-boring lathes. Claim was also made under the act of March 2, 1919, for \$86,316, based upon an alleged oral agreement to reimburse claimant for machinery purchased in connection with the above-mentioned contract. By its decision of December 11, 1919, this Board held that claimant was not entitled to recover on either branch of its claim. Claimant appealed to the Secretary of War who returned the case to this Board on May 5, 1920, for the purpose of taking further testimony. Held, on rehearing, affirming the prior decision of this Board, that claimant is not entitled to recover.

Mr. McCandless writing the opinion of the Board.

**STATEMENT OF FACTS.**

1. In a decision under date of December 11, 1919, the Board of Contract Adjustment denied relief in this case. Claimant appealed to the Secretary of War, and the claim has been returned to this Board under date of May 5, 1920, for the purpose of taking further testimony.

2. Claim is here made:

(1) For the remission of liquidated damages deducted by the Government because of claimant's failure to make deliveries in accordance with the terms of a formally executed contract, which has been terminated by completion. The claimant contends that the delay was caused by the Government's issuing priority orders to the Davenport Locomotive Works, and thereby cutting off the claimant's source of supply of lathe beds.

(2) For reimbursement for expenditures made in the purchase of machinery with which to complete the above-mentioned contract. The claimant contends that this machinery was bought in reliance upon an assurance from Capt. Ernest W. Pittman that the Government would reimburse the claimant for said expenditures.

3. In the fall of 1917 negotiations were conducted between the claimant company and the United States Government with a view to placing with said company an order for lathes. The claimant did not have facilities for making the component parts of these lathes and planned to have a large number of said parts supplied by the subcontractors. One of the subcontractors which claimant looked upon as a source of supply was the Davenport Locomotive Works. On November 21, 1917, the claimant requested said Davenport Locomotive Works to bid upon lathe beds. On November 24, 1917, the Davenport Locomotive Works submitted a bid which read in part as follows:

"We can cast four sections of 20 feet or less a week and could put patterns in the sand within 10 days after receipt of patterns and begin delivery of finished beds at the rate of approximately 80 ft. of length per week 5 weeks after receipt of patterns."

Upon December 10, 1917, claimant wired Davenport Locomotive Works:

"Have final acceptance from Government for boring lathes. Will close contract with you at once."

And again on December 12:

"Will place order with you for 2,000 feet bed casting finished at Chadwick's suggestion. Can you make patterns? If so, wire return per hour. Can mail blue print with order at once."

On December 13, 1917, the Davenport Locomotive Works wired claimant:

"On account of amount of work taken for large planers we will be unable to determine for several days the space we will have available and advise you to look elsewhere for your early requirement."

On December 17, 1917, claimant wired the Davenport Locomotive Works:

"Must have 2,000 feet of bed at rate of 80 feet per week. Will ship on pattern in 10 days. Advise if you are in position to handle pattern work."

To which the Davenport Locomotive Works replied on December 18, 1917:

"Impossible to handle your work, we have five months' capacity work for our planers all for priority A-1 Government work."

4. The Davenport Locomotive Works' refusal to accept claimant's order is explained as follows in a letter of December 19, 1917:

"As you stated we quoted you price on November 24th and amended same on Dec. 1st. Your Mr. Tufts came to our plant on Dec. 3d, looked it over, and went away without placing any order, but stated that an officer of the Ordnance Department would arrive at Davenport the next day to inspect our plant for the Ordnance Department. This inspector did not arrive, nor did we hear from you for a week."

afterwards, and had supposed that either you did not receive the contract or that you had placed your order elsewhere. Your Mr. Tufts stated when he was in Davenport you had located three planers in Ohio which you could get to do this work.

"On Dec. 9th we received a wire from Dodge Bros., who have taken a contract for gun carriages from the United States Government, offering us a contract for planing boring lathe beds practically the same weight as those offered by yourselves, and not having heard from you we accepted their proposition. Their representative arrived here the next morning with the contract and a priority A-1 order so that we had no option whatever but to sign up the contract."

5. On or about December 31, 1917, the claimant received a formal contract under date of December 26, 1917. This contract called for delivery to the Watervliet Arsenal of 43 gun-boring lathes and provided "the delivery on these machines shall be as follows: One machine to be delivered each working day, beginning April 1, 1918, in accordance with the schedule specified with each individual purchase order." Article 7 of said contract provides in part as follows:

"\* \* \* there will be deducted as liquidated damages to be made thereafter 1/30 of 1% of the contract price for each and every day of delay in delivery beyond the date stipulated in Article 1 for the completion of each delivery specified."

6. Although the claimant was aware of the fact that the Davenport Locomotive Works could not supply the lathe beds, nevertheless it proceeded through J. W. Sparks, its president, to sign the above-mentioned contract. Efforts were then made to find a source of supply for 2,044 feet of lathe beds necessary to fill the contract. Great difficulty was experienced due to the fact that practically all concerns equipped with tools for machining large castings were being worked to capacity on Government orders. However, a number of subcontractors were found who agreed to devote a portion of their capacity to claimant's work. It became apparent in April or May that these subcontractors could not make deliveries, and claimant thereupon purchased tools and machinery with which it machined lathe beds and completed the contract, the last delivery being made in December, 1918. As a result of the delays the sum of \$41,789.55 was deducted by the Government under the liquidated damage clause of the contract.

7. Claimant alleges that the machinery cost \$86,316 and that the purchase was made in reliance upon an assurance from Capt. Ernest W. Pittman that the claimant would be reimbursed by the Government for the money so expended.

8. On June 2 and 4 the Board of Contract Adjustment heard the testimony of Mr. Charles D. Gibson, Thomas E. Monks, Walter Chadwick, Joseph V. O'Drain, Ernest W. Pittman, Col. W. W. Gib-

son, and Frank W. Waddell, pursuant to the following directions received from the Secretary of War:

"(a) That further testimony be taken as to the facts with relation to that portion of petitioner's claim which is based on an alleged agreement to reimburse claimant for the cost of planers; the testimony of Capt. Pittman and any other Government witnesses who may be examined to be taken in such a manner as to permit cross-examination by the claimant.

"(b) That there be taken such further testimony as may be necessary to enable the Board of Contract Adjustment to determine to what extent, if at all, claimant was delayed in its deliveries by reason of Government work accepted by the Davenport Locomotive Works under priority order."

9. Testimony was taken with the view of determining the Davenport Locomotive Works' ability to deliver lathe beds to the claimant within time to enable claimant to make deliveries under its Government contract. Upon this point Mr. Walter Chadwick, sales manager of the Davenport Locomotive Works, testified that said company could have turned out finished lathe beds at the rate of 100 feet per week, and might have increased the output to 130 feet per week by running their planers 24 hours instead of 16 hours per day. He stated, however, that no work could have been done without a pattern, which he understood the claimant intended to furnish after making a few necessary alterations. In answer to the question as to how soon after receipt of the pattern the Davenport Locomotive Works could have started upon the first planing operations on castings, Mr. Chadwick replied:

"We specified five weeks in our proposal, but as a matter of fact it took us three weeks to get to planing Dodge Brothers castings, which were virtually the same thing."

It appears from the record that on December 17, 1917, the claimant wired the Davenport Locomotive Works:

"Must have two thousand feet of bed at rate of eighty feet per week. Will ship the pattern in ten days."

From the above it would seem that claimant was negotiating for lathe beds with a view to deliveries being completed 30 weeks after December 27. At this rate the last bed would have been delivered about August 1, 1918, after which it would have been necessary to assemble the lathes at claimant's plant in Columbus, Ohio. Inasmuch as the claimant was under contract to make delivery of the final lathes on May 20, 1918, it is apparent that deliveries could not have been made on schedule time.

10. Testimony was also taken with a view to determining why the Davenport Locomotive Works refused to make beds for the claimant. An explanation of this is to be found in the Davenport Locomotive

Works' letter of December 19, 1917, set out in paragraph 4 of this decision, and also in the testimony of Mr. Chadwick, which was, in part, as follows:

"Mr. STUMP. Did you not feel at that time that you were under some responsibility to this Cleveland company?"

"Mr. CHADWICK. Not in that sense; no, sir. We talked to Mr. Sparks. I talked to him personally here in Washington, and on a trip to New York I saw him again; and I told Mr. Sparks, after we had submitted the two quotations, that those large tools were in great demand: that if he did not place his formal order with us—give us a signed order for that work—somebody else would step in and place other contract with us, and we would be unable to make delivery on his job.

\* \* \* \* \*

"Mr. CHADWICK. Well, on November 24th we wrote him, and Mr. Sparks gave us to understand that he had the order, but he would not place a formal order with us until he had his order received from the Government. That is why we could not accept the Cleveland order—because he could not confirm his order to us."

11. Testimony was also taken with a view of determining whether or not the failure to obtain bed lathes was the sole cause of claimant's delay. Claimant was called upon to produce contracts and other records showing the dates upon which various component parts were delivered, but the Board was informed that said records could not be produced, that their whereabouts were unknown, and that in all probability they had been destroyed at the time the claimant company ceased doing business and the Simplex Co. failed. Both Mr. Gibson, general manager of claimant company, and Mr. O'Drain, Government inspector at the plant, were questioned. Their testimony was based wholly on memory and was conflicting in many respects. From the evidence it can not be said that had the Davenport Locomotive Works delivered the beds the claimant could have obtained bars, headstocks, gears, and carriages, for it does not appear that said component parts necessary to complete lathes were delivered more promptly than the beds. In fact, Mr. O'Drain states that the sole cause for delay in the latter part of November, 1918, was due to a shortage of gears and not beds.

12. Testimony was taken as to alleged agreement to reimburse the claimant for cost of planers. Upon this point there is a direct and irreconcilable conflict of testimony.

Mr. Chas. D. Gibson, general manager of claimant company, testified that about the middle of May, 1918, he talked with Capt. Pittman in Columbus, as follows:

"We talked in a general way about the slowness we were experiencing in getting plane beds. The beds were the main thing in that machine. So he asked if I had any solution, and I told him I saw

nothing but that the machinery must be purchased to complete the contract; that it was utterly out of the question to get outside firms or planers of sufficient size to handle the work. I then asked Capt. Pittman if it was not a general practice of the Government to finance the purchase of additional machinery, as I had known of several firms in Hamilton, where our other plant was located, wherein they had put up buildings and put in all the machinery. He said that that had been done right along." (P. 345.)

Mr. Gibson further testified that during the last week in May or the first week in June, 1918, a conference was held in the committee room of the Cleveland National Bank, and that there were present Capt. Pittman, Mr. O'Drain, Mr. Hood, Mr. Monks, Mr. Waddell, and Mr. Gibson. In describing this conference Mr. Gibson testified in part as follows:

"Conversation was as to the advisability of purchasing additional equipment to increase production on the gun-boring lathes. \* \* \*

"Capt. Pittman said that in his mind the only way out of that situation was to buy additional equipment such as planers, principally to complete that contract, and Mr. Monks then asked him, he said, 'I understand, Capt. Pittman, that the Government is buying these tools.' He said, 'We are not in a position to lend this money, any more money.' Capt. Pittman then said that the Government was buying tools and intended to reimburse the Cleveland Machinery & Supply Company or the Simplex, whoever paid for the tools, to the extent of their purchase." (P. 347.)

Mr. Frank W. Waddell, vice president of the Cleveland National Bank, testified that he was present at this conference in the committee room of the Cleveland National Bank in the latter part of May or the early part of June, 1918, and that the gentlemen mentioned by Mr. Gibson were present. He further testified in part as follows:

"Mr. WADDELL. The final result of the discussion was that Captain Pittman assured us that if we advanced the money and the machinery was bought that we could feel a reliance on the fact that the Government would perform its duty in regard to it \* \* \*.

"Q. Now what did he say the Government undertook to do?

"Mr. WADDELL. That they would be responsible for that machinery that was to be bought, or for the money that was to be advanced for buying that machinery. That was what our committee acted upon, too. \* \* \* We depended upon that promise to reimburse the bank if it advanced the money for the payment for that machinery." (P. 302.)

13. Mr. Thomas E. Monks, president of the Cleveland National Bank, testified that he was present at this conference in the committee room of the Cleveland National Bank in the latter part of May or early part of June, 1918, and that the gentlemen mentioned by Mr. Gibson were present. Mr. Monks further testified in part as follows:

"Mr. MONKS. \* \* \* The inspectors and Captain Pittman insisted that something had to be done and done immediately, or they



were going to take the contract away from them, and I do not know what all they did not say they were going to do.

"Q. Captain Pittman said that at this meeting?

"Mr. MONKS. Captain Pittman, not only at this meeting, but at other times.

"Q. Just say what was said at this meeting?

"Mr. MONKS. All right, at this meeting—that these lathes had to be gotten out, they were needed, that something had to be done to get machinery, if they could not get the machining done somewhere else, to do it themselves. We told him that we had to have some assurance, before we would advance any further money to buy machinery, that we were going to be reimbursed; and he assured us that the United States Government was advancing money to buy machinery, building plants and doing various other things for people, and that he could not see why we should doubt that he would not get this money from the Government. It was with that understanding that I went before the committee with Mr. Wardwell, and I recommended that this money be advanced. We did not make this loan to the claimant. We made it with the idea in mind that, while the money was being advanced to the claimant for machinery to go ahead and proceed with this order, that eventually the endorsed or the guarantor of that money was the United States Government." (P. 322.)

14. Earnest W. Pittman, captain, Ordnance, and assistant works manager at Watervliet Arsenal, testified in part as follows:

"Mr. PITTMAN. I have never been in the committee room of the Cleveland National Bank in my life. I did not attend this conference. I made none of the statements that it has been alleged I made because I was not there. Every word of it, every bit of it is untrue. I have never, until to-day, seen Mr. Wardwell, never set eyes on him; he has never seen me to speak to me. He may have seen me in passing. I think he may have made a mistake. Mr. Gibson and Mr. Monks could not have made a mistake. They know me too well to have made such a mistake. \* \* \*

"Q. Did you ever attend any meeting with any person where there was discussed the matter of obligating the Government for the purchase of any planers for the Cleveland company?

"Mr. PITTMAN. No."

15. Mr. J. V. O'Drain, Government inspector at claimant's plant, testified that prior to May 16, 1918, he attended a conference in the committee room of the Cleveland National Bank; that this was the only conference he ever attended at said place, and that Capt. Pittman was not at said conference, but that the other gentlemen mentioned were present, and in addition a Mr. Dilts, a civilian employee of the Government, was present. That the purpose of said conference was to arrange to have the Government pay to the claimant certain moneys that were being withheld upon a technicality. On page 379, Mr. O'Drain testified in part as follows:

"Q. Did you hear Mr. Dilts say anything to them about the Government being responsible for the repayment of any certain sums?



"Mr. O'DRAIN. I never heard any such statement.

"Q. Did you hear all the statements Mr. Dilts made at that meeting?

"Mr. O'DRAIN. I was there during the entire length of the conference.

"Q. Were you in close attention?

"Mr. O'DRAIN. Yes sir; we all sat around the table about this size or a little larger."

16. The witnesses were reexamined and questioned as to whether or not they might be in error as to the time or place of the conference, or could have mistaken Mr. Dilts for Capt. Pittman. The claimant's witnesses agreed that they could not fix the date exactly, but maintained that the conference took place in the committee room of the Cleveland National Bank, and Messrs. Monk, Gibson, and O'Drain stated that they knew Capt. Pittman too well to admit of the possibility of having mistaken him for Mr. Dilts.

17. The claimant herein is the Cleveland Machinery & Supply Co., which was the selling agent of the Simplex Machine Tool Co. Mr. Monk testified that the Simplex Co. went into the hands of a receiver, and the claimant company went out of business; that prior thereto this claim was assigned to the Cleveland National Bank in view of the fact that claimant company owed said bank about \$700,000. Copies of two letters under date of November 28 and December 21, 1918, are attached to record in substantiation of the alleged assignment.

#### DECISION.

1. Claim is here made under General Order 103 for the remission of \$41,789.55 deducted by the Government because of claimant's failure to make deliveries in accordance with the terms of a formally executed contract. The Board of Contract Adjustment has no jurisdiction over this claim for the reason that said contract has been terminated by completion, and for the further reason that liquidated damages which have accrued become vested rights and can not be waived by representatives of the War Department. (Hawthorne case, 11 Comp. Dec., 113.)

2. Claim is also made under the act of March 2, 1919, known as the Dent Act, for repayment to the claimant of \$86,316 alleged to have been expended for machinery used in connection with the above-mentioned contract. The basis of this claim is an alleged oral agreement between claimant's representative and Ernest W. Pittman, captain of Ordnance, United States Army. Claimant's witnesses have testified that Capt. Pittman agreed that if claimant would purchase the machinery in question the Government would pay for the same. Capt. Pittman denies having made this promise, and the testimony is irreconcilable. Upon the conflicting evidence this

Board finds that no agreement was entered into whereby the United States became obligated to reimburse the claimant for this machinery.

3. In returning this claim to the Board of Contract Adjustment, the Secretary of War asked that testimony be taken to determine to what extent, if at all, claimant was delayed in its deliveries by reason of Government work accepted by the Davenport Locomotive Works under priority orders. The following conclusions are submitted upon this point:

The claimant's contract is dated December 26, 1917, and was signed on or about December 31, 1917, at which time the claimant knew that the Davenport Locomotive Works had accepted priority contracts which would require its entire planing capacity for five months. Accordingly the claimant did not enter into the contract upon which this claim is based in reliance upon the Davenport Locomotive Works as a source of supply for lathe beds.

Inability to obtain lathe beds was not the sole cause of delay. It does not appear that bars, headstocks, gears and carriages, which are component parts of a complete lathe, were obtained by the claimant more promptly than beds. Claimant has not shown that had it obtained the beds it could have obtained these component parts at an earlier date. Accordingly claimant has failed to show that it could have expedited deliveries had it not been hampered by a lack of beds.

In view of the above it would seem that the question of what deliveries could have been made by the Davenport Locomotive Works (had it accepted claimant's order) is not material. In brief the situation is as follows: Claimant's contract called for 2,044 feet of lathe beds. The Davenport Locomotive Works was willing prior to December 9, 1917, to guarantee deliveries at the rate of 80 feet per week beginning 5 weeks after receipt of patterns. On December 17, 1917, claimant wired the Davenport Locomotive Works that it would ship a pattern within 10 days. Had this pattern been received on December 27, 1917, the Davenport Locomotive Works would have had 5 weeks within which to make delivery of the first lathe beds and the last bed would have been due 25 weeks thereafter, or a total of 30 weeks, after December 27, which would be approximately August 1, 1918. It appears from the testimony, however, that the Davenport Locomotive Works could have increased their deliveries to 100 feet per week and could have reduced the time for the delivery of the first lathe to 3 weeks but were unwilling to guarantee to do so.

The decision of the Board of Contract Adjustment under date of December 11, 1919, wherein relief is denied, is hereby affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 30, 1920.

**Case No. 1683.**

*In re* **CLAIM OF COCONUT PLANTATIONS CO.**

1. **CONTRACT: MEETING OF MINDS.**—Before the Secretary of War is authorized to settle a claim under the act of March 2, 1919, there must have been an agreement, express or implied, and to constitute an agreement there must have been a meeting of the minds of the contracting parties on all essential details of the transaction.
2. **IDEM.**—Where the Government issued purchase orders and a written contract to claimant containing stipulations as to the place of growing castor beans and places the delivery to which claimant did not agree, and refused to sign, there was no meeting of the minds and no agreement.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$474,823.12 expenses and loss in preparing for castor beans contract. Held, claimant not entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$474,823.12, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In August, 1918, the claimant entered into negotiations with the Office of the Director of Aircraft Production for the delivery to the Government of castor beans. The beans were to be grown or purchased in Nicaragua.

3. On September 19, 1918, the Office of the Director of Aircraft Production issued an order to claimant for not less than 170,000 or more than 255,000 bushels of castor beans at \$3 per bushel, final delivery not to be beyond August 31, 1919.

4. This purchase order stipulated that,

“Beans are to be grown in Nicaragua, Central America.”

It also contains the following clause:

“If through an act of God the contractor is unable to make delivery from his own plantation, he should supply any deficiency at the option of the Government from some Central American or South American country satisfactory to the Government at the price

herein mentioned f. o. b. vessel at a regular shipping port in such Central or South American country."

5. These clauses were unsatisfactory to claimant and it refused to accept a contract on that basis and continued negotiations.

6. On October 9, 1918, in pursuance of the further negotiations a new purchase order was issued to claimant which provided that,

"Beans are to be grown in Nicaragua."

and also contained the stipulation that delivery was not to extend beyond August 31, 1919, and a clause as follows:

"If through an act of God or the public enemy the contractor is unable to make delivery from his own plantation he should supply any deficiency, at the option of the Government, from some Central American or South American country satisfactory to the Government at the price herein mentioned f. o. b. vessel at a regular shipping port in such Central or South American country."

These were the same clauses that had been objectionable to claimant in the first purchase order and he again refused to accept the contract.

7. The Government record discloses that on October 17 the Bureau of Aircraft Production forwarded to claimant a contract, No. 4971, in accordance with the terms of the purchase order of October 9, 1918, and that the same was never executed and returned, and on November 8, 1918, the Bureau of Aircraft Production wired claimant as follows:

"Re tel. November eighth on account of changed conditions your contract can not now be closed. If policy is changed will wire you. Please return order and contract."

8. On November 13 claimant wrote the Bureau of Aircraft Production as follows:

"Your telegram signed 'Aircraft Procurement Mayer' received and holidays have interfered with reply. We are unable to return to you the order and contract just at the present time, because of the fact that there has been considerable expense incurred in connection with the same.

"We are therefore filing the same in our records temporarily together with your telegraphed advice of cancellation.

"We trust this method of handling the same will be satisfactory."

9. On November 18, 1918, the Bureau of Aircraft Production wrote claimant as follows:

"1. You are advised that this office still awaits return of executed copies of contract No. 4971 sent you for execution.

"2. You are requested to give this matter your immediate attention and see that all papers are returned to us without any further delay."

to which claimant replied:

"Replying to your favor of the 18th on above subject:

"We beg to advise that this contract and papers connected therewith are being held temporarily by the writer as treasurer of this

company, because the company has been put to some expense preparing to go ahead with this contract, and we do not know until we get out reports in, within the next thirty or forty-five days, just how much money has been expended or indebtedness incurred in connection with the same. For this reason the writer feels it his duty to the company to temporarily retain possession of the contract and papers connected therewith."

10. The contract was never executed and has never been returned to the Government.

#### DECISION.

1. The act of March 2, 1919, provides that the Secretary of War may settle on a fair and equitable basis all agreements, either express or implied, entered into prior to November 12, 1918.

2. In order that there may be a contract which the Secretary of War is empowered to settle, the parties must have agreed upon all terms and conditions of the contract, and some commitments or expenditures must have been made thereon.

3. The evidence in the instant case discloses that while claimant and the Bureau of Aircraft Production were negotiating for a contract they never reached an agreement and there never was a meeting of the minds. This Board is therefore of the opinion that no contract such as is contemplated by the act of March 2, 1919, was ever entered into between the claimant and the United States, and that the relief asked for must be denied.

#### DISPOSITION.

1. A final order denying relief will issue.

Mr. McCandless and Mr. Price concurring.

JUNE 30, 1920.

Case No. 2762.

*In re* CLAIM OF COWELL & CO.

1. **JURISDICTION.**—The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims.
2. **CLAIM AND DECISION.**—This claim under the act of March 2, 1919, for \$2,756.42 is for loss suffered by claimant due to alleged improper grading of its wool. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACTS.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, dated March 26, 1919, for \$2,756.42, by reason of an agreement alleged to have been entered into between Cowell & Co. and the United States.

2. The following is taken from the statement of claim:

“On or about May 1, 1918, claimants were licensed as wool buyers at Downing, Missouri. We bought from the growers locally 58,398 pounds of domestic wool at a fair price, based on the Atlantic seaboard price as established on July 30, 1917 (less profits to dealer). We paid for this wool to the growers thereof the sum of \$38,208.32. We shipped same to Winslow and Company, approved dealers at Boston, Massachusetts, a licensed distributing center, and were advanced approximately \$30,000.00 thereon by Winslow and Company. These wools were valued by the Government valuating committee and appraised and sold in accordance with the direction of said committee and we were allowed for the sale of said wools the sum of \$36,302.85.”

\* \* \* \* \*

We therefore claim as follows:

Reimbursement for net loss.....	\$1, 905. 97
Guaranteed profit.....	850. 45
Total.....	2, 756. 42

3. Under date of June 15, 1920, a member of the copartnership of Cowell & Co. submitted an affidavit in which he states that “we did not prior to May 29, 1920, file or present to any department or agency of the Government said claim.”

## DECISION.

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1918.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accordance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements Congress thought it best to place a time limit on the period during which such claims might be presented, and therefore inserted a provision in the act reading as follows:

*"Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act, presented after June 30, 1919, can not be considered by the Secretary of War, nor by the Board of Contract Adjustment, which in such cases is the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and, in so doing, must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Mr. McCandless and Mr. Eason concurring.



JUNE 30, 1920.

**Case No. 2748.**

*In re* **CLAIM OF EASTERN STEEL CO.**

- 1. DEVOTING FURNACE TO SPECIAL WORK AT REQUEST OF WAR INDUSTRIES BOARD — IMPLIED AGREEMENT — REIMBURSEMENT. —**  
Where the claimant at the request of the War Industries Board devoted one of its furnaces exclusively to the production of low phosphorous pig iron, with a promise that such board would find purchasers for all such iron produced and make allocations thereof through its customary machinery, there arose under the circumstances and within the purview of the act of March 2, 1919, an implied obligation on the part of the United States Government to reimburse claimant for its loss sustained by reason of so devoting its energies.
- 2. CLAIM AND DECISION.—**This claim for \$83,851.20 arises under the act of March 2, 1919, on an alleged implied contract. Held, claimant is entitled to relief.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, was filed for \$572,400 by reason of an agreement alleged to have been entered into between claimant and the United States of America, through Maj. W. M. MacCleary, Ordnance Department.

The claim was originally presented to the Philadelphia District Claims Board, which referred it to the Ordnance Claims Board, by which it was in turn referred to this Board. An amended statement of claim, Form B, was thereafter filed by claimant for \$83,851.20, being the loss on 10,800 tons of pig iron, allocated to the Watertown Arsenal, ascertained as set forth in paragraph 11 *infra*. A hearing was held at the office of the Board on June 23, 1920.

**FINDINGS AND DECISION.**

1. Claimant is a corporation organized and existing under the laws of the State of Pennsylvania.

2. At the times hereinafter mentioned, Jay C. McLauchlan was chief of the Pig Iron Section of the War Industries Board, under the direction of J. Leonard Replogle, director of steel supply. His duties were to see that there was a sufficient supply of pig iron made in the United States to take care of governmental necessities, and to distribute the same in accordance with governmental requirements.

3. When Mr. McLauchlan entered upon his duties as Chief of the Pig Iron Section it developed that there was great need on the part of the Government for low phosphorous iron, which was extensively used in gun forgings and the manufacture of similar articles. In addition to there being a great shortage of ore suitable for making iron of this description, there were few furnaces suitable for the purpose, and these of small capacity, and the situation was further complicated by a lack of coke. It came to the attention of Mr. McLauchlan that claimant had a large furnace idle on account of inability to obtain coke. Mr. Edward L. Herndon, claimant's treasurer, was summoned to Washington early in 1918, and informed that it was necessary to devote this furnace to the production of low-grade phosphorous iron. Mr. McLauchlan, through the agencies at his disposal, located quantities of suitable ore not only in the United States but in Cuba and Canada, and obtained from the Shipping Board steamers to bring the Cuban ore to the United States. Claimant was also able to purchase considerable quantities of suitable ore in Spain. As a result claimant was able to produce sufficient quantities of ore of the required character to keep the Tacony Ordnance Co., of Tacony, Pa., supplied with the iron necessary to carry out its part of an important Government program for gun forgings, down to the date of the armistice, November 11, 1918. During all this period claimant, through its treasurer, Mr. Herndon, was in practically daily communication with Mr. McLauchlan, both by personal interviews and conversations over the long-distance telephone.

Mr. McLauchlan, who was a witness upon the hearing, was unable to give the dates of any specific conversations, but described his dealings with claimant as a "continuous performance."

4. Under date of September 24, 1918, Capt. H. C. Phipps, Procurement Division, Raw Materials Section, Ordnance Department, dispatched the following letter to the commanding officer, Watertown Arsenal, Watertown, Mass.:

"1. The director of steel supply has requested of this section advice as to the probable requirements of the Watertown Arsenal covering low phosphorous pig iron for the first half of 1919, so that allocation may be made in the near future.

"2. The Raw Materials Section, Procurement Division, will appreciate prompt advices relating to the promises.

"By order of the Chief of Ordnance."

5. The commanding officer, Watertown Arsenal, returned the letter set forth in the last preceding paragraph with the following indorsement:

"1st Ind.

470.12

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"Commanding officer, Watertown Arsenal, Watertown, Mass., October 11, 1918. To: Capt. H. C. Phipps, Procurement Division, Raw Materials Section, Washington, D. C.:

"1. This arsenal will require approximately 1,800 gross tons of low phosphorus pig iron per month for the first half of 1919.

"2. This pig iron must be of the following analysis or sufficient ferro silicon furnished to bring same up to these specifications:

Si.....	1.50 to 2.00.
Phos.....	.04 and under.
S.....	.04 and under.
Cu.....	.10 and under.
Mn.....	0.75 to 1.25.

"C. M. WESSON,  
*"Col. Ord. Dept. U. S. A., Commanding.*  
 "(W. E. GUEST),  
*"Capt. Ord. Dept. U. S. A."*

6. The American Iron and Steel Institute is an association of persons and corporations engaged in the iron and steel industries, which on account of its information respecting the various steel and iron plants in the United States and the completeness of its records, was made use of during the latter part of the war by the War Industries Board as an instrumentality for making allocations of the commodities controlled by the director of steel supply. Under date of October 29, 1918, H. G. Dalton, chairman of the pig iron, iron ore, and lake transportation subcommittee of said American Iron and Steel Institute, dispatched the following letter to claimant:

"We have allocated to you the following:

"Name of consumer: Watertown Arsenal.

"Address: Watertown, Mass.

"Delivery point: Watertown, Mass.

"Tonnage: 10,800 tons.

"Grade: Low phos.

"Time of delivery: 1,800 tons per month first half 1919.

"Analysis specified on allocation request:

Silicon.....	1.50 to 2.00.
Sulphur.....	.04 and under.
Phosphorus.....	.04 and under.
Manganese.....	.75 to 1.25.
Copper.....	.10 and under.

"Governmental agency authorizing request: Ord. Dept. Pur. & Supply Br.

"REMARKS: The director of steel supply has been asked to have formal order sent to you promptly, and your earnest cooperation in taking care of this important business will oblige.

"Allocation #1295."

7. Under date of November 2, 1918, the Raw Materials Section, Procurement Division, Office of the Chief of Ordnance, dispatched the following letter to claimant:

" 1. I am directed by the Chief of Ordnance to inform you that the following pig iron has been allocated for shipment to Watertown Arsenal:

" Tons: 10,800.

" Grade: Low phos.

" Delivery desired: 1,800 tons per month first half of 1919.

" Specifications:

Sil.....	1.50 to 2.00.
Sul.....	.04 and under.
Phos.....	.04 and under.
Mang.....	.75 to 1.25.
Copper.....	.10 and under.

" 2. The Raw Materials Section, Procurement Division, requests that you consider this letter as authorization to enter the formal order of Watertown Arsenal, Mass., for the pig iron allocated on request #1295."

8. Under the same date, November 2, 1918, the Raw Materials Section aforesaid dispatched the following communication to the commanding officer of Watertown Arsenal, Watertown, Mass:

" 1. This office wishes to advise that the Eastern Steel Co. has been authorized to accept your order for pig iron:

" Tons: 10,800.

" Grade: Low phos.

" Delivery desired: 1,800 tons per month first half of 1919.

" Specifications:

Silicon.....	1.50 to 2.00%.
Sulphur.....	.04 and under.
Phosphorus.....	.04 and under.
Manganese.....	.75 and 1.25.
Copper.....	.10 and under.

" for shipment to you at Watertown, Mass.

" 2. It is requested that this office be advised whether formal order will issue to this office or be placed by the arsenal direct.

" By order of the Chief of Ordnance."

9. Under date of November 14, 1918, the commanding officer, Watertown Arsenal, dispatched the following communication to Capt. H. C. Phipps, Procurement Division, Raw Materials Section, Ferrous Branch:

" 1. Enclosed please find copy of your letter of September 24th and also first endorsement to the same by Watertown Arsenal.

" 2. Your letter, paragraph one, requested advice as to the probable requirements of this arsenal of low phosphorus pig iron first half of 1919.

" 3. This information was given as 10,800 gross tons, but only as an estimate, with no idea of placing order immediately. We are, therefore, unable at the present time to comply with your request in forwarding an order for this quantity. If this arsenal continues on the present program and maximum present capacity of foundry production is maintained the estimated quantity of pig iron will be used.

" 4. This material represents a value of approximately \$400,000.00, which is a considerable proportion of the stock fund which is available at this arsenal, nor do we have definite orders of allotments to which this quantity of material could be charged."

10. A careful search of the files of the Watertown Arsenal fails to show any record that any communication was had between the said arsenal and the claimant confirming or cancelling the allocation of the 10,800 tons of low phosphorus pig iron referred to in the foregoing correspondence, or that there was ever any communication whatever between the Watertown Arsenal and claimant upon the subject.

11. At the date of the armistice, November 11, 1918, claimant had on hand or in transit to its furnace 34,071 tons of low phosphorus, high manganese iron ore, which was more than sufficient for the production of the 10,800 tons of low phosphorus pig iron allocated to it for the Watertown Arsenal by the letters set forth in paragraphs 6 and 7 hereof. After the armistice the value of ore of the character described greatly depreciated. Claimant, which had various other contracts with the Ordnance Department, presented its claims to the Philadelphia District Claims Board, Ordnance Department, which made a complete investigation of them in the spring of 1919. The amount of shrinkage in value of low phosphorus iron ores was determined by said Board on the basis of that of the value of the ores for use in the highest grade pig iron for which a market existed. The shrinkage thus determined was prorated by said Board over the entire tonnage of orders on hand and was found to amount to \$7.764 per ton. The allocation of 10,800 tons to the Watertown Arsenal was included in this computation. Claimant has been paid upon all its other claims, payment upon this having been withheld upon it appearing that no purchase order for the 10,800 tons was ever issued by the Watertown Arsenal. Capt. E. F. Fader, Ordnance Department, who made the investigation and adjustment, testified before this Board that if the 10,800 tons had been omitted from the computation the loss would have been prorated upon the remainder of the ore.

12. Upon the foregoing facts this Board is of the opinion that the low phosphorus ore required for the production of the 10,800 tons of low phosphorus pig iron allocated to the Watertown Arsenal was purchased by claimant in reliance upon the promise of the President of the United States, through the proper section of the War Industries Board, that the Government would purchase the iron to be made therefrom; and it appearing that this particular 10,800 tons was allocated to the Army at the request of the Procurement Division, Ordnance Department, the facts present within the

purview of the act of March 2, 1919, as interpreted by previous decisions of this Board, such an agreement as the Secretary of War is authorized to and should pay, adjust, and discharge.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, March 3, 1919.

Mr. McCandless and Capt. Morgan concurring.

JUNE 30, 1920.

**Case No. 2530.**

*In re* **CLAIM OF GENERAL FIRE EXTINGUISHER CO.**

**1. CHANGE IN SPECIFICATIONS—DEFECTIVE MATERIAL FURNISHED.—**

Where claimant was given a purchase order to furnish two (2) recoil cylinders to be made according to certain plans and specifications from material to be furnished by the Government, at a stipulated price, and where during the process of construction it was necessary to change the plans and specifications by reason of defects in the material furnished by the Government, which change in plan occasioned an extra expense in manufacture, there arose within the purview of the act of March 2, 1919, an implied obligation on the part of the Government to reimburse claimant for the extra expense occasioned by the changed specifications.

**2. CLAIM AND DECISION.—**This claim for \$1,241.70 arises under the act of March 2, 1919, on an alleged implied agreement. Held, claimant is entitled to the relief sought.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$1,241.70, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Under date of July 10, 1918, a purchase order was issued to the claimant by Col. C. M. Wesson, commanding officer at Watertown Arsenal, numbered 254, by the terms of which the claimant company was to furnish two recoil cylinders in accordance with blue prints supplied by the Ordnance offices. The cylinders were for the purpose of testing the gun carriages for 240-mm. howitzers. The Government furnished the steel castings for the cylinders. It was understood at the time the order was placed that the boring of the castings would be done for the claimant by Harris-Corliss Co., of Providence. After the order was sent out, the Government directed the claimant to have the boring done by the Farrel Foundry & Machine Co., of Ansonia, Conn., and ordered the claimant to ship the castings by automobile truck from Providence to Ansonia. The cylinder castings were bored by the Farrel Foundry & Machine Co. and tested by the Government. It was found that the steel which the Government had furnished was porous and leaky and the arsenal officers deter-



mined that the bore of the cylinders should be made larger and a bronze lining inserted. This change made necessary a number of other changes, including the purchase by the claimant of new steel for cylinder heads which had to be machined. The original plans called for a hole to be drilled through the cylinder castings. After the bronze lining was inserted, it was necessary to have a hole drilled through the cylinder head. Several other changes were required in consequence of the defects which were found to exist in the cylinder steel. It is for these extras that claim is made. The claimant completed the testing device in a manner satisfactory to the commanding officer at the Watertown Arsenal and has been paid the price stated in the purchase order of July 10, 1918.

#### DECISION.

1. The claimant should receive reimbursement for its expenditures for additional labor and materials. They were all made necessary by the defective character of the steel castings which the Government furnished. It should receive reimbursement also for the additional amount which it has paid the Farrel Foundry & Machine Co. for the extra work done by it in reborring the cylinders and inserting bronze linings. The castings were shipped by the claimant from Providence to Ansonia in accordance to the explicit directions of an officer from the Watertown Arsenal and reimbursement should be made to the claimant for the expenses of trucking which it incurred. There is no dispute as to the facts. It is conceded that the Government castings were defective and that the extra work which the claimant performed was all necessary in order to complete the manufacture of the recoil testing devices.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate "C" to the Claims Board, Ordnance Department, for action in the manner provided in subdivision "C," section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Mr. McCandless concurring.

JUNE 30, 1920.

**Case No. 2732.**

*In re* **CLAIM OF HAEHL BROS.**

1. **JURISDICTION.**—The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims.
2. **CLAIM AND DECISION.**—This claim for \$402.96 is for loss suffered by claimant due to alleged improper grading of its wool. Held, no jurisdiction.

Maj. Miller writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under the provisions of Supply Circular No. 17, Purchase, Storage, and Traffic Division, dated March 26, 1919, for \$402.96, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. Claimant alleges that in October, 1918, he delivered to E. H. Tryon, at Stockton, Calif., 5,874 pounds of wool, for which he should have received 51 cents per pound; that this wool was delivered for use of the Government in accordance with the terms of the Government regulations for handling the wool clip of 1918 as established by the Wool Division, War Industries Board, May 21, 1918; that this wool was not properly graded in accordance with these Government regulations; that he was paid only \$0.4414 per pound, and that there is still due him the sum of \$402.96.

3. Claimant has submitted an affidavit in which he states that he did not present this claim to any department, official, or agent of the Government prior to January 19, 1920.

**DECISION.**

1. The act of March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," authorizes the Secretary of War to adjust, pay, or discharge certain informal agreements entered into during the emergency and prior to November 12, 1928.

2. This law was enacted in order to enable the War Department to adjust agreements which had not been reduced to writing in accord-

ance with existing statutes. The Secretary of War had no authority to adjust such agreements until the act of March 2, 1919, became a law. In granting the Secretary of War this special authority to adjust informal agreements, Congress thought it best to place a time limit on the period during which such claims might be presented and therefore inserted a provision in the act reading as follows:

*“Provided further, That this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen.”*

3. The provision fixing the last day upon which claims can be presented is plain and definite. Claims arising under this act presented after June 30, 1919, can not be considered by the Secretary of War nor by the Board of Contract Adjustment, which is in such cases the agent of the Secretary of War. This Board is authorized to adjust such claims in accordance with the terms of the act of March 2, 1919, and in so doing must comply strictly with every provision of the act. It is not possible for this Board to comply with only part of the act and to ignore the balance of its requirements. Therefore we must give as much consideration to the provision fixing a final presentation date as to the other portions of the act, and can not take jurisdiction of a claim which was not presented before June 30, 1919. (McDonald & Co., case No. 1655, Vol. II, these decisions, p. 442; Schultz & Hirsch, case No. 2170, Vol. II, these decisions, p. 763.)

4. Claimant having failed to present this claim before June 30, 1919 (and for nearly a year thereafter), it is clear that the claim can not be considered and that this Board is without power or authority to entertain same.

Mr. McCandless and Mr. Eason concurring.

JUNE 30, 1920.

**Case No. 2689.**

*In re* **CLAIM OF FRED T. LEY & CO. (INC.).**

1. **PERFORMANCE BOND—MISTAKE—REFORMATION.**—Where there is a mutual mistake in drafting a contract, in that both the Government representatives and the claimant understood that the premium to be paid a surety company for a contractor's bond is a proper element of cost for which claimant should be reimbursed under a cost-plus percentage contract, the contract will be re-formed so as to express the intention of the parties at the time the contract was entered into.
2. **CLAIM AND DECISION.**—Claim for \$2,500 filed under the act of March 2, 1919, but considered as presented under G. O. 103 because it is based upon a validly executed contract. The contract was a cost-plus contract for the construction of Camp Devens, Mass. Held, claimant is entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case comes to this Board as a class B claim, filed in accordance with P., S., and T. Supply Circular No. 17, 1919, by Fred T. Ley & Co. (Inc.), of Springfield, Mass., claimant herein, for the sum of \$2,500, premium paid by claimant for a performance bond under an alleged oral agreement between the claimant and the United States. Said performance bond was entered into to insure the performance of a formally executed contract entered into on the 11th day of June, 1917, by Fred T. Ley & Co., by Harold A. Ley, president, and the United States through W. A. Dempsey, major, Q. M., U. S. R., acting by the authority of the Secretary of War.

2. This claim was filed originally with this Board on June 28, 1919. Prior thereto, however, the bill for this item was filed with the Government disbursing officer at Ayer, Mass., approved, allowed, and paid by the Government. Thereafter the same was ordered disallowed and was refunded by the claimant at the request of the Government.

3. Under the terms of the contract the contractor was to—

“In the shortest possible time furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things

necessary for the construction and completion of the following work:

"At Ayer, Massachusetts. Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division, including the following additional units, viz,

"1 aero squadron,

"1 balloon company,

"1 telegraph battalion, Signal Corps,

"1 regiment Heavy Artillery, horse-drawn,

in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction."

4. Contract was for emergency work for construction of cantonment buildings at Ayer, Mass., on Form 586, War Department, Construction Division, United States Army, commonly called "cost-plus" contracts.

5. Article II of said contract provided:

"ARTICLE II. The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(h) Such bonds, fire, public liability, employers' liability, workmen's compensation, and other insurance as the contracting officer may approve or require, and such losses and expenses not compensated by insurance or otherwise as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fees, except as hereinafter provided."

6. Article IX of said contract provided:

"ARTICLE IX. *Bond*.—The contractor shall, prior to commencing the said work, furnish a bond with sureties satisfactory to the contracting officer in the sum of two hundred and fifty thousand dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

7. The contractor was ordered by the contracting officer to furnish a performance bond in the sum of \$250,000. Said contractor furnished said bond, and paid as a premium thereon the sum of \$2,500. The claimant performed the contract, and in making settlement thereon presented to the Government disbursing officer at Ayer, Mass., a bill for the premium on said performance bond.

8. The item of \$2,500 for premium on said performance bond was paid by the Government to claimant on November 5, 1917.

9. On the final settlement with claimant, Construction Division deducted the \$2,500 paid for the performance bond premium from the final payment due claimant.

10. It was the understanding of both the contractor and the officers of the Construction Division, United States Army, at the time of their entry into the contract herein mentioned, that the premium on the performance bond described in paragraph 9 of the contract was a reimbursable item under the terms of said contract.

11. Testimony to that effect was given by Col. Evan Shelby at the rehearing in the case of Fred T. Ley & Co., No. 150-C-760. It was stipulated that the testimony in that case might be considered as testimony in all cases of the Fred T. Ley & Co. (Inc.), and that portion of Col. Shelby's testimony upon which the decision in case No. 150-C-760 is based is considered as though given in this case.

#### DECISION.

The facts and supporting testimony in this case being the same as in claim 150-C-760, the decision in the latter case is followed and adopted herewith as follows:

"1. The Comptroller of the Treasury having held that the premium on the performance bond is not a reimbursable item under Article II of the written contract entered into herein, the question before this Board is whether or not the original contract can be so re-formed on the ground of a mutual mistake as to include as a reimbursable item the premium on performance bond.

"2. The re-formation on the ground of a mutual mistake of a written contract solemnly entered into should be undertaken only upon the clearest evidence that such a mistake exists. *U. S. v. Milliken*, 202 U. S. 168.

"3. In the instant case, the form of the written contract entered into was drawn up by the Construction Division of the Army, and was passed upon not only by the officer who drew the form of contract, Colonel Evan Shelby, but by a committee appointed by the General Munitions Board to draft the form of contract for all emergency work, and all of these officers intended that the form of written contract should include the premium on the performance bond under Article IX as a reimbursable item, and so informed all contractors who discussed the matter with them.

"4. In a proceeding for re-formation of a Government contract on account of mistake, the parol agreement is the real contract and may be shown in evidence together with the facts constituting the mutual mistake; and the written contract, though executed in accordance with R. S. 3744, may be re-formed by the parties to correspond to the real agreement. *Ackerlind v. U. S.* 240 U. S. 531.

"5. In the instant case the evidence clearly discloses that an oral agreement was entered into prior to the execution of the written

contract, whereby the Government was to reimburse the contractor for the premium on performance bond. We are satisfied that the contract herein does not express the intent of the parties in that it does not cover this item of reimbursement for the premium on the performance bond which both parties intended to do, but by error failed to accomplish.

"6. Clearly a mutual mistake was made herein, and the law would seem clearly to be that re-formation goes on the basis merely of an endeavor by mutual consent to clearly and correctly state the agreement made as of the date when it was intended to reduce it to writing. It may be said that until the Secretary of War and the claimant have succeeded in so reducing it to writing they have never actually made the contract in written form.

"7. This Board is therefore of the opinion that the original contract entered into between the United States Government and Fred T. Ley & Company should be re-formed so as to include the premium on the performance bond as a reimbursable item.

"8. This Board will therefore refer the matter to the Claims Board, Construction Division, for re-formation of the original contract by a supplemental contract re-forming the one heretofore made so that it will include the item for the premium on performance bond as a reimbursable item, and for final settlement of the account between claimant and the Government."

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, for action in accordance therewith.

Mr. McCandless and Mr. Price concurring.



JUNE 30, 1920.

**Case No. 2533.**

*In re* **CLAIM OF THE MARITIME MFG. CO.**

1. **DELAYS.**—Where the Government is to furnish material to be manufactured and the time for the deliveries of materials is not specified it is responsible only for unreasonable delays, as some delay was to be expected. Claimant is entitled to an allowance for machining hard forgings not in accordance with the specifications.
2. **CORPORATE REORGANIZATION—FACILITIES.**—Where a Canadian corporation, which has a thoroughly equipped going plant, suitable for machining shell forgings, is offered a contract by the United States, and for purposes of its own organizes a Virginia corporation composed of practically the same stockholders, officers, and directors as the Canadian corporation, and the property of the Canadian corporation is conveyed to the Virginia corporation in exchange for its stock, and the latter corporation takes over the shell contract, it is not entitled to payment for or amortization of the cost of the buildings and equipment unless specially contracted for, which was not done in this case.
3. **COST OF SURETY.**—Where the officers and principal stockholders of the claimant company guaranteed the United States that a loan of \$1,000,000 would be properly expended for facilities, in the absence of any promise they are not entitled to any pay therefor as they were merely guaranteeing the honesty of the company they controlled.
4. **SALARIES.**—Where the principal part of the time of executive officers is given to the preparation of unfounded claims against this Government no allowance will be made therefor.
5. **TERMINATION CLAUSE.**—Allowances made on suspended contracts, which contain a termination clause, are governed by said clause and no allowance can be made unless provided for therein.
6. **CLAIM AND DECISION.**—Claims under G. O. 103 on two formal contracts and a procurement order for \$1,687,497.86 for facilities, delays, and loss of profits. Held, claimant not entitled to recover.

Mr. McCandless writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, on a claim arising from two formally executed contracts and a procurement order.

2. T. McAvity & Sons (Ltd.), a Canadian corporation, was, during the year 1917, engaged in the manufacture of shells at St. John, New Brunswick, Canada, for the Canadian Government. Late in the

year of 1917 it ceased work for the Canadian Government and commenced negotiations to sell its shell-making machinery to the Maxwell Motor Co. and other corporations in the United States. Allan McAvity, who had been superintendent of production of the Imperial Munitions Board of the Canadian Government, ceased his connection with the Canadian Government and represented T. McAvity & Sons (Ltd.) in negotiating for the sale of said machinery in the United States.

3. In January, 1918, Dr. Joseph Flavelle, chairman of the Imperial Munitions Board of the Canadian Government, stated that T. McAvity & Sons (Ltd.) would not be permitted to ship its machinery to the United States, but that it could arrange with the United States Government to machine shells until such period as the Canadian Government might demand the use of said plant for its own purposes.

4. Maj. F. C. Cheston, negotiating officer for the production of shells and ammunition for the United States at Washington, wrote Allan McAvity late in 1917 that the United States Government might be willing to give T. McAvity & Sons (Ltd.) a contract to manufacture shells. Allan McAvity called on Maj. Cheston in Washington, D. C., during January, 1918, and Maj. Cheston offered to give T. McAvity & Sons (Ltd.) a contract to machine 100,000 9.2 shells at \$17 each. A procurement order was issued to T. McAvity & Sons (Ltd.) on said terms.

5. After receiving this order Allan McAvity returned to Canada and consulted with officers of the T. McAvity & Sons (Ltd.), and later informed Maj. Cheston that the officers of T. McAvity & Sons (Ltd.) proposed to organize a corporation in the United States, called the Maritime Manufacturing Co., to accept the said proposed order. Allan McAvity states that the company was organized in Virginia in order (1) that it might deal directly with the officials of the United States and not through its representatives in Canada, (2) to avoid taxation in Canada, and (3) that certain stockholders of the T. McAvity & Sons (Ltd.) need not share in the new enterprise.

6. The Maritime Manufacturing Co. was organized under the laws of Virginia on the 6th day of March, 1918, with a capital stock of \$2,000,000. Its directors are the five directors of the T. McAvity & Sons (Ltd.) and three additional directors.

7. The Maritime Manufacturing Co. issued stock of the par value of \$849,900 to T. McAvity Stewart and G. Clifford McAvity as trustees, which stock was placed with the Washington Loan & Trust Co. The T. McAvity & Sons (Ltd.) executed and delivered a bill of sale, covering certain machinery in two plants in St. John, New Brunswick, conveying the said machinery to T. McAvity Stewart and G.

Clifford McAvity, who conveyed the machinery to the Maritime Manufacturing Co. in return for certificates of shares of stock of the Maritime Manufacturing Co. amounting in par value to \$849,800, the estimated value of said machinery. The said certificates were issued to all the stockholders of the T. McAvity & Sons (Ltd.), except three, and delivered to T. McAvity Stewart and G. Clifford McAvity as trustees, and placed in the custody of the Washington Loan & Trust Co. to be held for the stockholders of the T. McAvity & Sons (Ltd.) in the proportion of their holding of the stock of the T. McAvity & Sons (Ltd.).

8. Allan McAvity testified that certain of the stockholders representing shares of the T. McAvity & Sons (Ltd.) amounting to about \$100,000 had refused to accept the said amount of stock of the Maritime Manufacturing Co., and had been paid cash for the value of said stock by T. McAvity Stewart, who took over the said stock. Seven hundred and one thousand five hundred and sixty-one dollars of said stock was issued for the equipment in building No. 1, which was used for manufacturing 9.2 shells. (The remainder of the equipment for which the remainder of the stock was issued, applies to 4.7 contracts under which all claims have been settled by the Government.) Accordingly, in the settlement of the contracts which are the subject of this claim, we are concerned only with the item of \$701,561.

9. The stockholders of the two companies and their holdings of stock were, at the time of the issue of said stock, as follows:

Stockholders.

	Maritime Manufacturing Corporation.	T. McAvity & Sons (Ltd.)
	<i>Number of shares.</i>	<i>Number of shares.</i>
McAvity, George.....	3,470	3,570
McAvity, John A.....	1,880	925
McAvity, Thomas.....	100	400
McAvity, Thomas (trustee).....	100	150
McAvity, Stephen S.....	104	52
McAvity, James L.....	600	330
McAvity, Mrs. George.....	50	25
McAvity, G. Clifford.....	120	10
McAvity, Rosamond.....	10	5
McAvity, Mrs. James H.....		155
McAvity, Mrs. William.....	104	202
Schofield, Mrs. H. W.....		27
Schofield, Mrs. C. D.....		52
Crosby, Mrs. F. S.....	224	164
Came, Mrs. F. E.....	232	168
Stewart, T. McAvity.....	1,282	591
Knowlton, F. J. G.....	42	33
Coster, Charles.....	30	15
McAvity, Allan G.....	150	
	8,498	6,874

10. The first contract, War Ord. P-4230-1795-A, was executed under date of March 15, 1918, for the machining of one hundred thousand 9.2 H. E. shells at \$17 each. The contract provides:

"Deliveries shall begin within 30 days after receipt of forgings, to be completed January 1, 1919, in accordance with a definite monthly schedule of deliveries to be furnished later."

"ARTICLE III. The United States agrees to furnish without cost to the manufacturer the material or component parts listed below, in quantities determined by the Chief of Ordnance to be requisite, and at such times as will enable the manufacturer to deliver the articles in accordance with the schedule of deliveries hereinbefore set forth.

\* \* \*

"Upon the completion of this contract the actual expense to the contractor of machining the steel forgings and copper bands furnished by the United States, as hereinafter provided, which during the process of conversion develop defects will be determined by the contracting officer, and such actual expense as determined and allowed will be paid by the United States to the contractor in addition to the contract price of the articles as herein fixed.

"Upon the completion of this contract the actual cost to the United States of steel forgings and copper bands spoiled or destroyed through faulty workmanship in the contractor's plant will be computed by the contracting officer, and the actual cost thereof will be charged against the contractor and deducted from any payments to be made the contractor, or if no such payments remain to be made the contractor shall immediately pay to the United States the cost of such forgings and copper bands as determined by the contracting officer.

"All scrap resulting from the manufacture under this contract shall be the property of the contractor.

"ARTICLE IV. In the event of the cancellation of this contract, as in this article provided, the United States will inspect the completed articles or material then on hand and such as may be completed within thirty (30) days after such notice, and will pay to the contractor the price herein fixed for the articles or material accepted by and delivered to the United States. The United States will also pay to the contractor the cost of the component materials and parts then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specifications referred to in schedule 1 hereto attached, and also all costs theretofore expended and for which payment has not previously been made and all obligations incurred solely for the performance of this contract of which the contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract.

"Title to all such component material and parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States."

On March 26, 1918, the claimant wrote the Bureau of Ordnance, Washington, D. C., as follows:

"We inclose herewith schedule of deliveries for the above order, and trust you can arrange for the forgings to be delivered at least two months in advance of the above schedule. Ample time should also be allowed for transit, depending upon the point from which shipment is made.

"We specified in our tender that forgings should be delivered at least two months in advance of schedule, but this is barely sufficient to insure continuous operation, and full allowance should therefore be made for delays in transportation.

"Our plant is now ready to start operations, and we trust early delivery can be made here of component parts to enable us to get started."

*Estimate of deliveries 9.2" shells.*

April	-----	2,500
May	-----	5,500
June	-----	7,500
July	-----	11,000
August	-----	13,500
September	-----	15,000
October	-----	15,000
November	-----	15,000
December	-----	15,000
Total	-----	100,000

"Provided we get 5,000 forgings by April first and further provided that forgings are supplied two months in advance of the above schedule."

In reply to the above letter, Maj. Merrill G. Baker, of the Projectile Section, Ordnance Department, wrote the claimant on March 30, 1918, as follows:

"1. I am directed by the Acting Chief of Ordnance to make acknowledgment of your letter of March 30th, P471.17/830, inclosing schedule of monthly deliveries on the above contract calling for the machining of 100,000 9.2" shell.

"2. Your request in regard to supplying forgings has been noted and will be complied with as fully as it is possible to do."

11. On August 7, 1918, the parties entered into a contract supplemental to the foregoing contract, which contains the following clause:

"Whereas it is desired to supplement and amend said contract in the interest of the United States so as to change the dates of deliveries, the contractor having been delayed in the performance of the contract by the failure of the United States to deliver component parts as agreed in time to enable the contractor to complete the contract as provided therein, such delays having been wholly beyond the control and without the fault of the contractor."

Articles I and II of the supplemental contract provide as follows:

"ARTICLE I. Delivery of the articles contracted for shall be made in accordance with the following schedule which supersedes the schedule of deliveries set forth in the original contract:

During the month of September, 1918-----	2, 500 shell.
During the month of October, 1918-----	5, 500 shell.
During the month of November, 1918-----	7, 500 shell.
During the month of December, 1918-----	11, 000 shell.
During the month of January, 1919-----	13, 500 shell.
During the month of February, 1919-----	15, 000 shell.
During the month of March, 1919-----	15, 000 shell.
During the month of April, 1919-----	15, 000 shell.
During the month of May, 1919-----	15, 000 shell.

"ARTICLE II. Except as herein modified, all the terms and conditions of the agreement dated March 15th, 1918, shall remain in full force and effect."

12. On or about May 20, 1918, procurement order P8247-2414-A was sent to the claimant by Lieut. Col. R. P. Lamont, representing the United States, providing for the machining of 160,000 9.2 H. E. shells, deliveries to begin August, 1918, and end May, 1919, in accordance with schedule, at the price of \$17 each f. o. b. St. John, New Brunswick. The said procurement order was followed by a formal written contract dated May 20, 1918, P8247-2414-A, which provides for the machining and deliveries of the 160,000 9.2 shells at \$17 each, as set forth in said procurement order. The contract provides:

"ARTICLE I. The contractor represents that its present facilities are inadequate for the performance of this contract, and agrees to provide and erect such buildings, equipment, machinery, tools, and other facilities (hereinafter called increased facilities) as, in addition to the contractor's normal facilities, will enable it to perform all the terms and conditions of this contract, estimated expenditure of which is not to exceed \$1,000,000.

"The contractor agrees to file with the contracting officer a schedule of the kind and value of all increased facilities as soon as installed. \* \* \*

"If, however, this contract is terminated through no fault of the contractor, prior to complete performance thereof, the contractor shall be entitled to reimbursement for the cost of the increased facilities hereinbefore described, to the extent of an amount computed by multiplying the total number of shell then remaining undelivered and as to which the contractor is not in inexcusable arrears, by a unit figure obtained by dividing the value of the increased facilities by the total number of shell named in this contract.

"Upon payment of this sum, title to removable equipment of an equivalent value (based upon the value at the time of installation, as set forth in the schedule of increased facilities hereinbefore required to be filed with the contracting officer) shall vest in the United States with privilege of removal within one year thereafter.



"ARTICLE III. The contractor agrees to deliver all the completed shell to the United States f. o. b. cars contractor's plant in accordance with the following:

During the month of November, 1918-----	2, 500 shell.
During the month of December, 1918-----	5, 000 shell.
During the month of January, 1919-----	7, 500 shell.
During the month of February, 1919-----	10, 000 shell.
During the month of March, 1919-----	15, 000 shell.
During the month of April, 1919-----	15, 000 shell.
During the month of May, 1919-----	15, 000 shell.
During the month of June, 1919-----	30, 000 shell.
During the month of July, 1919-----	30, 000 shell.
During the month of August, 1919-----	30, 000 shell.

"The entire contract shall be completed by August 31, 1919."

Article IX sets forth a termination clause, in effect the same as the cancellation clause set forth in the foregoing contract, and provides that the Chief of Ordnance at any time may notify the contractor that "any part or parts of the shells herein contracted for then remaining to be delivered, shall not be manufactured or delivered."

13. On September 12, 1918, Maj. M. G. Baker wrote the claimant that the Government would prepare an order for the claimant to machine 200,000 9.2 shells in accordance with specifications, and the Government would furnish forgings, base plugs, and copper bands. The price to be received by the claimant was \$17 per shell, f. o. b. claimant's plant, the deliveries to begin July, 1919, and end December, 1919. The said letter contained the following paragraph:

"6. It is understood that the Government will not furnish any increased facilities in the above."

14. A requisition for a contract for machining the said 200,000 9.2 H. E. shells at \$17 each, numbered War-Ord-P15204-3647-A, was drawn up September 20, 1918. The requisition states:

"The contractor represents that its present facilities are inadequate for the performance of this contract and agrees to provide and erect such buildings, equipment, machinery, tools, and other facilities (hereinafter called increased facilities) as in addition to the contractor's normal facilities will enable it to perform all the terms and conditions of this contract, estimated expenditure of which is not to exceed \$500,000.

"\* \* \* If, however, this contract is terminated through no fault of the contractor, prior to complete performance thereof, the contractor shall be entitled to reimbursement for the cost of the increased facilities hereinbefore described, to the extent of an amount computed by multiplying the total number of shell then remaining undelivered and as to which the contractor is not in inexcusable arrears, by a unit figure obtained by dividing the value of the increased facilities by the total number of shell named in this contract."



Apparently this requisition sets forth the terms of an agreement between the United States and the claimant, made after September 12, 1918. It seems no procurement order was issued to the claimant and the written contract called for by said requisition was never sent claimant. Thereafter, on January 20, 1920, the Ordnance Claims Board drew certificate "C" covering the said order for 200,000 shells.

15. On or about November 26, 1918, the United States inspector at the claimant's plant advised the claimant that it must cease operations within 30 days from that date. The claimant then gradually ceased operations, and finally discontinued operation on December 26, 1918.

16. As the claimant was incorporated in the State of Virginia, its claim was filed with the Baltimore Ordnance Board. The said board's auditors examined the claimant's books and in July, 1919, recommended that the claimant be paid for all its expenditures under all the contracts for new buildings, new machinery, and the cost of manufacture of said shells, including \$701,561 for its original equipment, \$565,000 for certain land and the original building, power house, and certain other buildings, plus 10 per cent of the cost of manufacture of said shells, less all payments and salvage, and finally found that a balance of \$1,119,856.94 should be paid the claimant in full settlement.

17. The Claims Board, Ordnance Department, refused to approve the recommendation of the Baltimore Claims Board, and found (1) that the said sums of \$701,561 and \$565,000 should not be allowed, and (2) that the claim should be considered on an amortization basis.

18. On December 16, 1919, the Ordnance Board made an item settlement with the claimant, as follows:

*Item Settlement No. 1, dated Dec. 16, 1919.*

Unworked direct materials -----	\$7,387.22
Indirect materials -----	57,048.75
Subcontractor's claims -----	157,037.84
Expenses from date of suspension to Dec.	

15, 1919, as follows:

Supervision and clerical wages -----	\$14,416.42
Material and supplies -----	1,678.02
Soft coal -----	11,236.72
Electric power -----	2,136.74
Water taxes, etc. -----	627.68
Liability insurance -----	252.09
Fire insurance -----	1,612.08
General plant expense -----	4,987.94
Taxes -----	850.00
Automobile expenses -----	2,973.62
Watchmen's wages, etc. -----	16,766.26

## Expenses from date of suspension to Dec.

15, 1919, as follows—Continued.

Traveling expenses .....	\$13, 946. 40	
Directors' fees.....	600. 00	
	<hr/>	\$72, 083. 97
Interest on Government loan to Jan. 1st.....		9, 916. 65
Interest on award from Jan. 1st, 1919 to Dec. 15, 1919, at 6 per cent.....		60, 359. 01
	<hr/>	\$142, 359. 62
159/160 of the cost of additional buildings (exclusive of Building No. 1, on which contractor claims \$500,000 for land and building, and exclusive of power house and equipment, on which contractor claims \$65,000), machinery, tools, equipment, and office building alterations, together with installation charges, all being items on War-Ord P-8247-2414A .....		828, 248. 52
	<hr/>	
Gross total.....		1, 192, 081. 96
Deductions:		
Components spoiled in manufacture.....	\$11, 251. 50	
Interest on \$1,000,000 loan to Dec. 30, 1918.....	9, 916. 65	
Proportion ( $\frac{1}{2}$ ) of Government loan.....	500, 000. 00	
Interest on above from Jan. 1, 1919, to date of payment thereof .....	28, 916. 66	
	<hr/>	550, 084. 81
	<hr/>	
Net amount (for which claimant received cash) .....		641, 997. 15

Explanation of \$828,248.52 item: This item is made up as follows:

Cost of buildings #2, #3, and #4, with dwelling houses, etc.....	\$434, 312. 11
Cost of machinery, tools, and equipment (not including original) ..	627, 200. 48
Cost of installation of above.....	266, 519. 43
Cost of alterations to office building at King St.....	5, 425. 61
	<hr/>
	1, 333, 457. 63

The above total was apportioned as follows:

#2 contract .....	\$833, 457. 63
#3 contract .....	500, 000. 00
	<hr/>
	1, 333, 457. 63

and as 1,000 shells were shipped on #2 contract claimant was paid 159/160 of \$833,457.33, or \$828,248.52, and 1/160 or \$5,209.11 was treated as having been amortized.

*Statutory award (#3 contract) dated March 12th, 1920.*

Government paid:

Proportion of cost of buildings, machinery, equipment, etc. ....	\$500, 000. 00
Interest on above from Jan. 1, 1919, to Dec. 15, 1919, at 6% .....	28, 750. 00
	<hr/>
Gross amount.....	\$528, 750. 00

## Deductions from above:

Balance (½) of Government loan.....	\$500,000.00
Interest on above from Jan. 1, 1919, to Dec. 15, 1919, at 6% .....	28,750.00
Net amount.....	\$528,750.00
Government took title to:	
Unworked direct materials.....	7,387.22
Indirect materials .....	57,048.75
Machinery, tools, and equipment.....	627,200.48
	<hr/>
	691,636.45

Government took title to equipment and materials costing \$691,636.45 on December 16, 1919, and after they had shipped motors, engines, boilers, machine tools, etc., sold the claimant the balance, on May 1, 1920, for \$101,200.00.

In the above item settlement the claimant was repaid the sum of \$434,312.11, which it expended for buildings No. 2, No. 3, and No. 4. Accordingly, the United States owns an equitable interest in said buildings.

19. The Claims Board, Ordnance Department, disallowed all the items of the claim, hereinafter set forth, except that it offered the following amounts in full settlement:

(a) For unloading forgings.....	\$8,812.45
(g) Salaries of executive officers from Dec. 26, 1918.....	20,000.00
(h) Legal expenses and auditors' expenses.....	2,797.16
	<hr/>
Total .....	31,609.61

The claimant now appeals from the decision of the Claims Board, Ordnance Department.

20. As the contracts are not cost-plus contracts, we will consider the claim upon an amortization basis. The claimant was asked to present the items of its claim and it has presented the following items:

*Statement of claim on amortization basis.*

Item.	Description.	Amount.
(a)	Excess costs of manufacture due to (1) delays in receipt of forgings, (2) delays in receipt of base plugs, (3) machining hard forgings, (4) unloading surplus forgings, (5) unloading surplus copper bands, (6) machining shells in process, (7) maintaining excess staff, and other charges.....	\$228,392.75
(b)	50,577/100,000 of depreciation of equipment in #1 building, etc.:	
	Cost of equipment.....	\$701,561.18
	Estimated present value (Col. Mattby's figure).....	89,898.84
	<hr/>	
	Depreciation .....	611,662.34
	50,577/100,000 of depreciation.....	309,360.46
	Estimated present fair value of equipment to be paid for by U. S. unless salvage by us.....	89,898.84

Item.	Description.	Amount.
(c)	159/160 of depreciation of #1 building etc., and P. house equipment:	
	Cost of above-----	\$565,000.00
	Estimated present value-----	300,000.00
	Depreciation -----	265,000.00
	159/160 of above-----	\$263,343.75
	(Building, land, etc., become our property.)	
(d)	Cost of obtaining personal guarantee by indorsement of note to United States Government for one million dollars--	50,000.00
(g)	Salaries of executive officers of company from date of cessation of operations (December 26, 1918) until date of final payment of claim, at the rate of \$105,000.00 per year----	-----
(h)	Cost of all legal expenses, auditors' expenses, charter fees, etc., to date of final payment of claim-----	-----
(i)	Cost of caring for Government property, insurance, and all incidental expenses, from Dec. 15, 1919, until date of payment of claim and complete removal of Government property----	-----
(j) (x)	Interest on all amounts due the contractor from date of suspension to date of payment, at the rate of 6% per annum -----	-----
(e)	Damages for delay in receipt of forgings for five months; delays in receipt of base plugs; hard forgings supplied us, etc., etc.; sustained by the company as a result of admitted default of the United States Government in furnishing forgings as called for by the contract, minimum-----	429,300.00
(f)	Damages by reason of early shutdown of plant on December 26, 1918, instead of January 31, 1919, minimum-----	143,100.00
(k)	10% fee on cost of outlay in preparing to perform contract No. 2-----	160,549.55
(w)	Amount of interest on the purchase of forgings and copper bands, etc., paid under protest to the Ordnance Claims Board--	13,552.31

From the above we would of course be willing to deduct the salvage value of any equipment retained by us.

21. The claimant manufactured a total of 50,423 shells for which it received payment from the United States Government at the rate of \$17 a shell or the total sum of \$857,191. The total cost of manufacturing said shells, the claimant alleges, was \$610,759.28.

22. Item (a), \$228,392.75. The claimant has introduced no testimony, although so requested, of the separate amounts claimed under subdivisions marked 1 to 7, inclusive, of item (a) of its claim. The said item apparently consists of costs caused by alleged delays, etc., above the estimated cost of \$8 per shell. Allan McAvity testified in relation to the said item (a) as follows:

"Our contention is that not more than \$8 per shell is properly chargeable to the cost of manufacture. That would amount to about \$403,000 and the balance above that amount, that is the difference between \$403,000 and \$610,000, or about \$207,000, is excess cost due to the various delays as given under headings (referring to item (a))."

23. The contract of March 15, 1918, provides—

“That the deliveries shall begin within thirty days after receipt of forgings \* \* \* in accordance with the definite monthly schedule of deliveries to be furnished later.”

The claimant on March 25, 1918, sent the Bureau of Ordnance a schedule of deliveries beginning April and ending December, 1918, and requested a delivery of component parts, and pointed out that said schedule was dependent upon receipt of 5,000 forgings by April 1 and the continued supply thereafter. The Ordnance Department replied on March 30 stating that claimant's request in regard to supplying forgings would be complied with as fully as it is possible to do. It seems under the said contract and letters no definite agreement as to deliveries of forgings and base plugs had been made.

Subdivisions 1 and 2 of item (a). The supplement to the first contract extends the schedule of deliveries which the claimant offered to commence in April, provided it received component parts in good time, so that the said deliveries were to begin in September. The said supplement also contains the admission that the delay in performance was not the fault of the claimant, and that it was caused “by the failure of the United States to deliver component parts as agreed in time to enable the contractor to complete the contract as provided therein.” Although the supplement to the first contract speaks of the failure of the United States to deliver component parts as agreed, etc., we have been unable to find in the terms of the contract and in the letters, or in the evidence, that the United States did agree to deliver the said component parts within a specific time. The testimony shows that on September 6, 1918, October 1, 1918, and in November, 1918, the work was delayed because the claimant had not been supplied with base plugs by the United States Government.

Subdivision 3 of item (a). The claimant has introduced no evidence of the amount of its loss resulting from machining hard forgings. Maj. Day, representing the United States, allotted certain hard forgings to the claimant. Allan McAvity complained to Maj. Day, who explained that the claimant must take its proportion of the certain hard forgings with other contractors.

Subdivisions 4 and 5 of item (a). Claimant has given no evidence of the amount of the cost of unloading surplus forgings and copper bands. The Claims Board, Ordnance Department, has offered in settlement of these items the sum of \$8,812.45.

Subdivision 6 of item (a). Machining shells in process. Allan McAvity testified that more than 100 shells were left partially completed, and also adapters. These the claimant subsequently purchased as scrap.

Subdivision 7 of item (a). Maintaining excess staff and other charges. Allan McAvity testified that the claimant rented from T. McAvity & Sons (Ltd.) the machinery in the original building until June 6, 1918. It later rented from T. McAvity & Sons (Ltd.) 18.4 acres of land, building No. 1, the power house, and several other buildings, and was charged by T. McAvity & Sons (Ltd.) for rent until on or about September 1, 1918. Part of these items of rent, a part of the salaries of certain officers at the rate of \$100,000 per year, and also part of the counsel fees paid by the claimant for the organization of its company, and other services to December 26, 1918, are claimed under subdivision 7 of item (a). Allan McAvity testified that part of the said salaries of said officers, and part of said counsel fees, and part of the rent were included in the item for installation (amounting to \$226,519.43) paid in the item settlement of December 16, 1919. Apparently the Claims Board, Ordnance Department, allowed as a part of the said installation item such portion of the rent and salary of officers as it considered, under the circumstances, was due. Although the claimant's witnesses were repeatedly questioned regarding each of the said items, they failed to introduce testimony of the separate amounts.

24. Item (b) for \$309,360.46. The claimant demands a depreciation allowance, but the claimant's figures show the demand is for an amortization allowance on the cost of the equipment in building No. 1, which it alleges amounted to \$701,561.18, in the proportion that the undelivered portion of shells under the first contract bears to the total 100,000 shells contracted for, less \$89,998.84, the estimated value of said equipment. No evidence was submitted that any agreement was made between the claimant and the United States for the amortization of said equipment. Maj. Cheston conducted the original negotiations early in 1918, with Allan McAvity as a representative of T. McAvity & Sons (Ltd.), which owned the building and equipment at St. John, New Brunswick. It had failed in its attempt to sell the said equipment in the United States. The officials of the Canadian Government had advised T. McAvity & Sons (Ltd.) that it would not be permitted to ship the said machinery to the United States but that it could make contracts with the United States for shells until such time as the Canadian Government might demand the use of the said plant. The preliminary negotiations were conducted by Maj. Cheston with Allan McAvity as a representative of T. McAvity & Sons (Ltd.) and a procurement order was issued to T. McAvity & Sons (Ltd.) in February, 1918. Late in February, 1918, or early in March, Allan McAvity explained that T. McAvity & Sons (Ltd.) had concluded to organize the Maritime Co. in Virginia, to take over the said first contract for 100,000 shells, as this plan, for a number of



reasons, was more advantageous to T. McAvity & Sons (Ltd.). No objection to this plan was made by Maj. Cheston and the Maritime Co. was organized with officers and directors which included all the officers and directors of the T. McAvity & Sons (Ltd.). If the first contract had been made with T. McAvity & Sons (Ltd.), no question of the amortization of this equipment could have arisen, as it was a going plant when Allan McAvity was negotiating for it with Maj. Cheston. The claimant contends that, inasmuch as it formed a new corporation with two new stockholders, and with three of the stockholders of T. McAvity & Sons (Ltd.) omitted, claimant should be allowed amortization for the said equipment in the proportion stated.

25. Item (c), \$263,343.74 (stated as depreciation but figured as amortization). Allan McAvity has testified that the claimant was charged by T. McAvity & Sons (Ltd.) for rent of building No. 1, together with the power house and 18.4 acres of land on which the plant was located, until September 7, 1918. He testified that when the claimant was arranging the terms of its second contract with the United States, under which it obtained a loan from the United States of \$1,000,000, to be expended on additional buildings and equipment, the War Credits Board of the United States demanded a mortgage of the buildings and land on which the proposed buildings were to be erected, and that T. McAvity & Sons (Ltd.) therefore deeded not only the said 18.4 acres of land, but also the said building No. 1, and the said power house and said other buildings, at an estimated valuation of \$565,000. The claimant now asks to be allowed to amortize said buildings and land in the proportion that 150,000 shells uncompleted under the second contract bears to 160,000 shells, the total of said second contract. From \$565,000, the estimated cost of said buildings and land, the claimant deducted the estimated present value, \$300,000, and alleges that on the balance, or \$265,000, it should be allowed amortization. The said second contract provides:

"ARTICLE I. That as the claimant's present facilities are inadequate, it shall erect buildings, equipment, etc., necessary to perform the contract at an expenditure not to exceed \$1,000,000." (See par. 12, *supra*.)

It seems no expenditures for the original buildings and power house were contemplated under the terms of the second contract.

26. Item (d), for \$50,000. In order to secure a loan of \$1,000,000 the claimant arranged with the War Credits Board that George McAvity, John A. McAvity, and T. McAvity Stewart, all directors of the claimant, and, respectively, president, vice president, and Washington representative of the claimant, should indorse the claimant's note in favor of the United States Government for \$1,000,000 loaned



to the claimant. Allan McAvity testified the claimant has agreed to pay the indorsers the said sum.

27. Item (g), salaries of executive officers from date of cessation of operations, December 26, 1918, until date of final settlement, at the rate of \$105,000 per year. We have stated above Allan McAvity's testimony to the effect that part of the salaries claimed in this item were included under installation set forth in connection with the item settlement, and pertaining to the installation of machinery in the new buildings, and that a part is included in the sum claimed under item (a).

Frank L. Miller, purchasing agent of the claimant, testified that George McAvity, president, John A. McAvity, vice president, Charles Coster, secretary, T. McAvity Stewart, Washington representative of the claimant, and Allen McAvity, managing director, and witness, as purchasing agent, devoted a large amount of their time to the business of the claimant company from the time it ceased operations until this date. During said period, he testified, Allan McAvity and himself had given over their entire time to the claims of the company, John A. McAvity, T. McAvity Stewart, and Mr. Coster had devoted about one-half their time during said period to the company's claims, and that George McAvity had devoted three-fourths of his time during said period to the business of the claimant. Nevertheless, it appears that George McAvity, John A. McAvity, Mr. Coster, and T. McAvity Stewart are all directors and, respectively, president, vice president, secretary, and Montreal representative of the T. McAvity & Sons (Ltd.), and that the T. McAvity & Sons (Ltd.) has conducted business during said period. The only activity of the claimant since it ceased operations has been the preparation of its claims and the care of the property.

The Claims Board, Ordnance Department, has offered the claimant \$20,000 in settlement of this item, which seems to be a fair amount.

28. Item (h), legal expenses and auditors' expenses, including charter fees. Allan McAvity testified that the claimant paid the following sums:

Feb. 18th, 1919, registration fee in Virginia.....	\$325. 00
Feb. 20th, 1919, Price & Dulany, legal fees.....	500. 00
Mar. 29th, 1919, Barnhill, Ewing & Sanford, legal fees.....	1, 070. 36
Mar. 27th, 1919, Edward Bates, valuation of property.....	25. 00
June 25th, 1919, Can. Appraisal Co.....	820. 00
June 7th, 1919, documentary stamps, etc.....	639. 59
W. E. Anderson, valuation of property.....	25. 00
Price Waterhouse, audit of books.....	1, 554. 32
Barnhill, Ewing & Sanford, legal fees.....	15, 000. 00
G. L. Boothe, registration fee.....	25. 25
Barnhill, Ewing & Sanford, legal fees.....	1, 200. 00
	<hr/>
	21, 448. 61

and that undetermined sums are still due as follows:

Price & Dulany, legal fees.

Barnhill, Sanford & Harrison, legal fees.

Gov. Pugsley, legal fees.

Gardner L. Boothe, registration fee.

Virginia registration, and others.

On March 4, 1920, the Claims Board, Ordnance Department, wrote the claimant, offering a sum in full settlement of this item, and stated in said letter:

"Under designation legal fees subsequent to January 1st, 1919, on which you claim \$18,016.41, the Board has allowed \$2,797.16."

Allan McAvity, when questioned as to whether legal fees prior to January 1, 1919, had been paid the claimant, stated that the claimant had been paid 110/454ths of its claim for legal expenses, amounting to \$9,316.53, prior to December 16, 1918, and that the remaining portion of the said expenses was included in its claim for overhead under item (a).

29. Item (i), cost of caring for Government property from December 15, 1919. With the \$1,000,000 loaned by the United States Government to the claimant under the terms of the second contract, the claimant erected buildings 2, 3, and 4 and purchased certain machinery. It states that the total cost of the said three buildings and equipment, together with the cost of installation and the cost of the alterations in its office, was \$1,333,457.63. In the item settlement of December 16, 1919, costs for the care of said buildings and equipment were paid the claimant to that date, as set forth in the said item settlement. Claimant now demands the continued costs of caring for the Government equipment up to the time that it purchased the balance of materials and machinery from the United States Government on March 26, 1920, and May 1, 1920, respectively.

30. Item (i) x, interest. The claimant demands interest at 6 per cent on all sums due the contractor from the date of suspension to the date of payment.

31. Item (e), \$429,300, damages caused by the delay of the United States in delivering forgings and base plugs, and by supplying hard forgings. Allan McAvity testified that had the United States supplied forgings and component materials in accordance with the claimant's request and in accordance with the schedule of deliveries originally set forth in the procurement orders preceding the first and second contracts, the claimant would have produced 90,000 additional shells by December 26, 1918, on which it would have made a profit of \$3 per shell, plus \$1.77 for scrap, or a total of \$429,300. As we have stated before, under contract No. 1 no definite arrangement was made for the deliveries of component parts. The United

States undertook to comply with claimant's request to supply forgings as fully as it was possible to do under the circumstances.

On May 15 the claimant wrote Maj. Cheston that it was proceeding with the erection of its new buildings and that it had ordered new machinery with the understanding that the Ordnance Department would allot orders available, based on output developed at the time when orders are placed, for delivery up to January, 1920.

The claimant offered to machine an additional 160,000 9.2 shells by June 1, 1919, at \$17 each, and stated:

"If components are available, we expect to ship from new plant as follows:"

Then followed a schedule of deliveries from October, 1918, to May, 1919, or a total of 160,000. It also stated:

"We also expect, if components are supplied immediately, to ship from existing plant to complete existing order of 100,000 9.2 shells by the end of February."

It therefore appears that on May 15, 1918, the question of the time of supplying forgings and component materials was uncertain. As we have already stated, the schedule of deliveries was changed under the supplement to the first contract from the estimated deliveries beginning April and ending December to a schedule beginning September, 1918, and ending May, 1919. The second contract when finally executed, instead of scheduling deliveries from August, 1918, to May, 1919, as suggested by the claimant in its letter of May 15, scheduled the deliveries from November, 1918, to August, 1919. Allan McAvery testified that the officers of the claimant gave much attention to the construction and installation of the new buildings and equipment, and this to a degree slowed down production under the first contract.

32. Item (f), for damages by reason of shutdown of plant on December 26, 1918, instead of January 31, 1919, \$143,000. On November 26, 1918, the claimant received a telegram from the Imperial Munitions Board, Canada, stating in effect that at the request of the Ordnance Department of the United States said board notified the claimant that munitions being manufactured in Canada were no longer required and that "production is to cease in accordance with the terms of contracts." The claimant replied that it did not recognize the said telegram, as it was dealing direct with the United States Government.

On December 6, 1918, claimant received a telegram from the American department of the Imperial Munitions Board, Ottawa, Ontario stating in effect that the claimant's reply had been transmitted to Washington, and that Col. Lamont had telegraphed that if claimant continued under its contract it would do so at its own risk.

On or about December 19, 1918, the claimant received from Lieut. Col. Charles W. Fairchild suspension notices referring to all its contracts with the United States Government requesting it to suspend further operations under said contracts "except such operations as may be necessary to complete material now in process in your plant, but in no case shall work continue beyond January 31, 1919." Allan McAvity testified that Lieut. Paul C. Rebmann, United States ordnance inspector at the claimant's plant, in answer to the telegram of November 26, advised the claimant that it must cease operations within 30 days from that date. Meantime the claimant had communicated with the authorities in the United States and received its suspension notice, dated December 19, 1919—

"to suspend operations \* \* \* except such operations as may be necessary to complete material now in process in your plant, but in no case shall work be continued beyond January 31, 1919."

As the claimant had at the time of receipt of such suspension notice ceased the first operations, it could not under the terms of said notice continue longer than necessary to finish the materials then in process. As the claimant had then dismissed many of its men, it ceased work on December 26, 1918. It would not have been profitable to continue longer under the circumstances.

33. Item (*k*), 10 per cent fee on cost of outlay in preparing to perform contract No. 2, \$160,549.55. This sum is claimed on the following amounts alleged to have been expended on contract No. 2:

Increased facilities in item settlement.....	\$828, 248. 52
Other increased facilities treated as amortized.....	5, 209. 11
No. 1 building and land purchased Sept. 7, 1918.....	500, 000. 00
No. 1 power house and transmission equipment.....	65, 000. 00
Cost of obtaining guarantee of loan.....	50, 000. 00
Subcontractors' claims .....	157, 037. 84
	<hr/>
	1, 605, 495. 47

34. Item (*w*), \$13,552.31, interest on the purchase of forgings, copper bands, etc., paid under protest to the Claims Board, Ordnance Department. At the hearing the claimant's attorney, Gov. Pugsley, admitted that the said sum could not be legally claimed.

The claimant agreed to purchase the said forgings and materials for \$320,175.48 from the Baltimore District Salvage Board on March 12, 1919. The claimant did not pay for said forgings and take title to them until March 16, 1918. Then the United States Government required the claimant to pay 5 per cent interest over said period, or \$13,552.31.

This sum the claimant paid under the terms of the written contract of March 16, 1920.

35. The claimant's attorney, Gov. Pugsley, stated, on page 647 of record book IV:

"If the United States Government owns the buildings, let them take them or accept a fair salvage offer. We are willing to give, as Mr. McAvity says, a fair salvage offer, not only on building No. 1, but for any interest the United States Government might have in the No. 2, No. 3, and No. 4 buildings, but we have never agreed to take them as a gift or as compensation."

Allan McAvity was questioned as to the value of buildings No. 2, No. 3, and No. 4, and testified regarding the price which the McAvitys would be willing to pay for said buildings, as follows:

"I would not like to undertake a higher price than a basis of a total of \$400,000. It is now \$300,000, because we have just dealt with the Salvage Board and paid off \$100,000, or agreed to pay off \$100,000 for this machinery that was left there."

#### DECISION.

1. Item (a). Excess costs of manufacture due to:

- (1) *Delays in receipt of forgings.*
- (2) *Delays in receipt of base plugs.*

The United States was unable to deliver forgings, base plugs, and other materials to the claimant as rapidly as the parties expected. As a result on claimant's outlay for rent, overhead, maintenance of staff, etc., it sustained partial losses. Claimant has found it impossible to itemize these losses, and the Government's obligation as to dates of delivery is not definitely defined. It appears, however, that to some extent the delays were unreasonable, and allowance should be made to cover the losses growing out of unreasonable delays.

- (3) *Machining hard forgings.*

Claimant is entitled to recover excess costs of manufacture growing out of Government's failure to deliver forgings in accordance with specifications. Claimant has, however, failed to show the amount of loss attributable to this cause.

- (4) *Unloading surplus forgings.*
- (5) *Unloading surplus copper bands.*

The Ordnance Claims Board has offered the claimant the sum of \$8,812.45 as compensation for these items. Claimant failed to prove that a larger amount was due, and in the absence of such proof this sum appears reasonable.

- (6) *Machining shells in process.*

Work performed by the claimant in machining shells in process, so far as it is not covered by former allowances, should be computed and allowed.

(7) *Maintenance of excess staff, and other charges.*

This item is apparently a part of items 1 and 2.

*General remarks applicable to item (a).*

Claimant asks that the sum of \$207,000 be awarded in payment of all excess costs of manufacture. This is in effect a demand that the Government bear all cost of manufacture over and above \$8 per shell, which amount the claimant considers to be a proper cost of production. This method of computing loss is subject to various objections, among others that it does not take into consideration the indefinite sum allowed the claimant under the installation item, nor does it take into consideration the fact that some part of the delay was to be reasonably expected in view of the fact that no definite time for the delivery of forgings, etc., was agreed upon under the terms of the first contract.

The losses sustained under item (a) should be computed and allowed.

2. Items (b) and (c). The claimant asks amortization of the equipment in the original plant in the proportion stated in item (b), and amortization of the original buildings in the proportion stated in item (c). The said buildings and equipment constituted a going plant for machining 9.2 shells when the United States Government began negotiations with T. McAvity & Sons (Ltd.). No agreement was made with either T. McAvity & Sons (Ltd.) or its subsidiary, the Maritime Co., to amortize the said equipment and buildings. The Canadian Government had forbidden T. McAvity & Sons (Ltd.) to sell and transport its equipment in the United States, but permitted it to machine shells for the United States Government temporarily. The fact that T. McAvity & Sons (Ltd.) organized the Maritime Co. in the United States for its own purposes, and transferred its plant to the new company, and that three of the McAvity's smaller stockholders sold their rights in the new company, is no reason for allowing the amortization of said buildings. The contracts specifically provide what payments shall be made in case of termination. They do not provide for amortization of the original plant.

For the expenditures made in accordance with the terms of the second and so-called third contracts, the claimant has been fully compensated. Accordingly, items (b) and (c) are denied.

3. Item (d) covers the claimant's demand for \$50,000 which it states is due George McAvity, John McAvity, and T. McAvity Stewart, president, vice president, and Washington representative of the claimant, respectively, for guaranteeing the claimant's note in favor of the United States Government for the sum of \$1,000,000. The second contract, under which this sum was loaned, provides that "it shall be expended for buildings, equipment, machinery, tools, and



other facilities." It seems that the risk the three officers took in guaranteeing the note of the company which they controlled as officers and directors, and as owners of the majority of the stock, was only that the said company should expend the said \$1,000,000 in accordance with the terms of the said second contract. They were in effect guaranteeing the honesty of the company which they controlled. They were able to protect themselves by countersigning all checks for the necessary materials purchased with the said million dollars.

We are unable to find that the United States Government is in any way obligated under the terms of the said second contract to pay the said sum.

4. Item (*g*). The Claims Board, Ordnance Department, has offered the claimant \$20,000 in settlement of its claim for salaries of executive officers from December 26, 1918, to date. A large part of the time of said executive officers has been devoted to urging large items of this claim which we believe to be without merit. We approve the said offer of the Claims Board, Ordnance Department, and deny any further sum.

5. Item (*h*). For legal expenses. Claimant admits that a certain part of the claim for legal services performed prior to December 16, 1918, has been paid. The claimant's witness was unable to identify how much.

The Claims Board, Ordnance Department, has offered claimant \$2,797.16 in settlement of its claim for auditor's expenses, charter fees, etc., to date. The contract does not provide for such expenditures. Accordingly they are denied.

6. Item (*i*). It seems the claimant should be allowed the reasonable cost of the care of Government machinery stored in buildings No. 2, No. 3, and No. 4 from December 15, 1919, until it was sold to the claimant in May, 1920.

7. Item (*i*) x. Interest, not having been allowed the claimant by the terms of the contract, is denied.

8. The amount claimed under item (*e*) for damages caused by delay in the deliveries of component parts is in effect a demand for prospective profits. Allowance has already been made under item (*a*) for the losses caused the claimant by delays. Under the provisions of the termination clause no allowance can be made for prospective profits. Accordingly item (*e*) is denied.

9. Claimant's demand for damages by reason of the early shut-down of the plant, under item (*f*), is denied. The Government's obligation in this matter is fixed by the termination clause in the contract. Under the terms of suspension orders the claimant properly shut down within 30 days from the notices it received on November 26, 1918.



10. Under item (*k*) the claimant demands 10 per cent on the cost of expenditures under contract No. 2. Under contract No. 2 the claimant borrowed \$1,000,000 from the United States Government and expended it for buildings and equipment. The contract does not provide that the claimant shall have 10 per cent of said expenditures. The claimant has been fully paid for the expenditures in accordance with the terms of the said contract.

11. Claimant's demand under item (*w*) for \$13,552.31, it seems, has nothing to do with the contracts under consideration. The claim is for interest paid under the terms of the contract made with the United States on March 16, 1920, by which it purchased forgings, copper bands, etc., from the Salvage Department of the United States. The claimant's attorney admits that it has no legal claim under this item.

12. Under the item settlement of the Claims Board, Ordnance Department, the claimant was paid \$434,312.11, which represents the cost of buildings No. 2, No. 3, and No. 4. In view of the fact that the buildings were erected on claimant's land in Canada, the United States Government can not take title to these buildings. It is improper that the claimant should acquire these buildings without paying the reasonable salvage value. Allan McAvity estimated this value at \$300,000, and the claimant's attorney announced at the hearing that claimant was willing to purchase the United States Government's interest in said buildings.

13. The items enumerated in paragraphs 1, 4, and 6 of this decision are proper charges against the United States Government. The amounts due under paragraphs 1 and 6 must be computed. Against the sums thus computed to be to the claimant's credit the United States Government should receive credit for the fair salvage value of buildings No. 2, No. 3, and No. 4.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits a copy of its decision to the Claims Board, Ordnance Department.

Col. Delafield and Mr. Fowler concurring.

JUNE 30, 1920.

Case No. 1248.

*In re* CLAIM OF MUELLER METALS CO.

1. **FACILITIES.**—Where an officer of the Government stated that in the event of the erection of a mill by claimant for the purpose of placing it in a position to manufacture brass rods for the Government he would be glad to recommend the giving of an order for brass rods, but at the same time also informed claimant that he, the officer, had no authority to direct claimant to do any of these things, there is no agreement, express or implied, by which the Government was to pay for such facilities.
2. **INFORMAL CONTRACT.**—No agreement, express or implied, to purchase 10,000,000 pounds of brass rods results from statements by an officer of the War Department made to claimant to the effect that when the accounts of the War Department were cast up so as to show where it stood on rods there would be given claimant a preliminary optional agreement proposing to place orders, throughout a certain period of time, for a certain amount of brass rods; especially when the officer further stated that such preliminary optional agreement was not in itself an order, and that he, the officer, had no authority to give an order for brass rods.
3. **EQUIPMENT, ADDITIONAL.**—Where claimant was informed that, because of unfairness to competitors, who were required to take orders for small rods with orders for large ones, it could not expect Government orders for large size rods unless it was equipped to manufacture small as well as large brass rods, and thereupon it procured additional equipment, so as to be able to manufacture small rods, there was no promise of orders by the Government upon which the expense so incurred would be chargeable to the Government.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

From the decision of this Board dated November 24, 1919, an appeal was taken to the Secretary of War, who returned the file to this Board with the following recommendation:

“That further evidence be taken as to the nature of the agreement, if any, entered into October 3, 1918, and as to the expenditures, if any, incurred in reliance thereon.”

This Board took the following testimony on June 4 and June 5, 1920:

1. Oscar B. Mueller, president of the claimant, testified that on September 26, 1918, he had an interview with Capt. Leslie S. Gordon

of the Procurement Division of the Ordnance Department in charge of the purchase of brass rod, during which interview Fred B. Mueller, vice president of the claimant, and Charles T. Ford, Washington representative of the claimant, were with him; and that Capt. Gordon said:

"I give you an order for 10,000,000 pounds."

Quoting further from Mr. Mueller's testimony:

"Captain Gordon then said that Lieut. Weaver was out of the city, or words to that effect, and that as soon as he returned he would report this matter to Lieut. Weaver and have him issue the formal order for the 10,000,000 pounds of rod. \* \* \*

"He (Captain Fabins) then took us out to Mr. Renner, and he stated to Mr. Renner that we had been given an order for 10,000,000 pounds of rod and that Mr. Renner was to arrange for the raw materials \* \* \*."

"His (Captain Gordon's) exact words were: 'I will give you an order for 10,000,000 pounds.'"

2. Charles T. Ford testified concerning said interview of September 26, 1918, as follows:

"Mr. Gordon said he would give the 10,000,000-pound order and that upon return of Mr. Weaver he would have him place the order with us for 10,000,000 pounds. Then the question of the raw material was brought up and Captain Gordon instructed Corporal Murray to take us to Captain Fabins, who had charge of the Raw Materials Section, and Corporal Murray expressed to Captain Fabins that he was instructed by Captain Gordon to tell him that we had been awarded or had an order for 10,000,000 pounds and that he could make arrangements for the raw material.

"Then Captain Fabins took us to Mr. Renner, who had charge of the raw material, and explained to him regarding the 10,000,000-pound order, and he said he would make the arrangements to ship the metal, but he could not, if I remember it, give him an order for the entire amount, but would see that he would have all of the metal that he would need." \* \* \*

"He (Captain Gordon) said that we could handle 10,000,000 pounds and he said 'I will give an order for 10,000,000 pounds.'"

3. Capt. Gordon testified concerning the conference on September 26, 1918:

"My recollection of it is that I told him, or told them \* \* \* that I would allot to them out of our prospective requirements approximately 10,000,000 pounds and that when Lieutenant Weaver, who had charge of the actual getting out of the orders, returned from his vacation I would take the matter up with him and see that actual orders were issued for the amount we at that time required."

\* \* \* \* \*

"When we placed an order we notified or sent Captain Fabins a copy of the order, and that was his authority for ordering out the requisite amount of raw material. \* \* \* At the time under dis-

cussion I was trying to get away from difficulties experienced during the previous winter in the securing of a supply of raw material to enable the contractors to proceed at full capacity in the manufacture of rod, and along this line I was ordering out to all brass rod manufacturing plants great quantities of copper and spelter, frequently very much in excess of any orders actually placed with them."

\* \* \* \* \*

"\* \* \* I have no recollection of giving the Mueller Metals Company a direct order for 10,000,000 pounds of rod. I call attention again to the fact that I feel positive that my actual statement to them was that I would assign or allocate to them 10,000,000 pounds direct, orders for which would be placed later."

"Capt. FRAZER. You told them then that you would allocate the 10,000,000 pounds of rods to be assigned to them when the orders came, is that correct?"

"Mr. GORDON. To be specified against. I would rather put it."

"Capt. FRAZER. To be specified against?"

"Mr. GORDON. When we had the sizes and requirements of the various fuse contractors worked out to the extent that we could furnish the Mueller Company with the sizes required."

\* \* \* \* \*

"Mr. GORDON. The records show that I discussed with Lieutenant Weaver the action taken by me covering his activities—I beg pardon, covering the activities of his particular department during his absence, and I did tell him the Mueller Metals Company had been in to see me and that they were now in a position to handle rod orders of all sizes and that I felt we must use them to their full capacity and that he had better place with them the first orders he had for contractors in that part of the country."

"Capt. FRAZER. Captain Gordon, do you know whether or not any blanket order for 10,000,000 pounds was ever issued to the Mueller Metals Company?"

"Mr. GORDON. No; no blanket order was ever issued. We never issued blanket orders of that kind. We issued preliminary letters stating that we would purchase a certain amount of material over a certain length of time, details of which would be furnished later on and the acceptance by the contractor of the terms of the preliminary letter really constituting on our behalf an option on their production."

\* \* \* \* \*

"Mr. McCANDLESS. Did you tell the claimants you gave them an order for 10,000,000 pounds of rod?"

"Mr. GORDON. No; I allocated to them 10,000,000 pounds of rod."

"Mr. McCANDLESS. What do you mean by that?"

"Mr. GORDON. I meant subject to our requirements necessitating the purchase of that much material. We would give them out of our total requirements 10,000,000 pounds as their share of the requirements."

\* \* \* \* \*

"Mr. GORDON. \* \* \* I felt I could safely assure him of using his output, which we estimated at approximately 10,000,000 pounds

up to July, provided that our fuse program was not curtailed to the extent of making necessary reduction in rod contracts."

\* \* \* \* \*

"\* \* \* I did not place with them a bona fide order for 10,000,000 pounds. We at that time and in our previous program of requirements of brass rods would write what we called preliminary letters to all brass manufacturers stating that we, subject to the requirements of the war program, would count on them for a certain production of rod, the actual orders for which would be placed as our requirements necessitated, and I think this arrangement was exactly the same thing, that we counted on them for 10,000,000 pounds of rod between then and July, but that the actual orders would be placed at a future date."

\* \* \* \* \*

"Q. Did you tell the claimant or any of the parties present that you would have Lieutenant Weaver place an order with them for 10,000,000 pounds?"

"Mr. GORDON. No; an order for 10,000,000 pounds. I told them Lieutenant Weaver would specify and furnish individual orders as we required the material."

4. Charles T. Ford testified that during his interview with Lieut. Weaver on October 3, 1918—

"Mr. Weaver explained to me that it would be impossible for him to give me the entire order. \* \* \* This was on the 3rd, but that he would give us a blanket requirement order and that from time to time he would send us an order that would cover specifications for the shipment." \* \* \*

\* \* \* \* \*

"Q. Then you met Lieut. Weaver on the 3rd?"

"Mr. FORD. Yes.

"Q. Did you tell Lieut. Weaver what the purpose of your call was?"

"Mr. FORD. I certainly did. The purpose of my call was to get the order for the 10,000,000 pounds.

"Q. Now, what did Lieut. Weaver say?"

"Mr. FORD. He said just exactly as my letter states there, that he could not give me an order covering that amount because of the specifications that would be required on each order; the specifications would mean the different sizes.

"Mr. FOWLER. What further did he say?"

"Mr. FORD. But he said 'I will give you a blanket order for the 10,000,000 pounds, and the specifications will go from time to time,' really in shipping instructions, \* \* \* He really told me the conditions. He said their program was now fixed up, that there would not be much until about January 31st and that there might at that time be changes in different things in relation to prices and that the specifications would come to us from time to time and would apply against this blanket order.

"Q. You say in your letter: 'He will give you a blanket order covering all that you can furnish up to July 1st. This will not be an official order.' Did he tell you that?"

"Mr. FORD. Yes. \* \* \* Well, I consider an official order would be a shipping instruction and it could not be, because he said

he could not give the official because he did not know what the specifications would be on shipment.

"Mr. FOWLER. Did you show Lieut. Weaver this letter?

"Mr. FORD. Oh, no; never thought of such a thing. \* \* \*

"Mr. FOWLER. What did you tell him you would report?

"Mr. FORD. I would report our conversation." \* \* \*

5. On October 4, 1918, C. T. Ford sent O. B. Mueller the following letter (this letter was not shown to Lieut. Weaver) :

" 10/4/18.

"Mr. O. B. MUELLER,

" *Port Huron, Mich.*

"DEAR FRIEND: I called on Lieutenant Weaver to-day regarding rod orders. He told me of the letters you had written asking that you be awarded contract for 10,000,000 pounds of rod. Lieut. Weaver said that it would be impossible for them to give any such order. He would only order as it is authorized. However, he will give you a blanket requirement order covering all that you can furnish up until July 1st. This will not be an official order. You will get official orders from time to time covering material named in this blanket order. This blanket order will contain all information as to price, specifications, and conditions relative to price changes that may come up.

"Lieutenant Weaver is getting cleaned up after his vacation and in a few days will get in to the requirements of the Middle West and will send you an official order for all of the present requirements after which they intend working up a schedule of winter and spring requirements. He assured me that he would keep your plant going to its full capacity.

"I did not get to talk with Captain Gordon to-day; will be down that way Monday and will make further report on this business.

"Yours truly,

" (Signed) C. T. FORD."

6. On October 5, 1918, Lieut. Weaver sent the claimant a telegram as follows:

" OCTOBER 5, 1918.

"War. Ord.—None.

"MUELLER METALS COMPANY,

" *Port Huron, Mich.*

"Answering wire fourth brass rods placing with you to-day order for million pounds size one and one-quarter, thirteen-sixteenths, three-quarters, seventeen thirty-seconds, thirteen sixty-fourths, point three eighty inch, point six forty inch stop deliveries, carload a week, starting soon as possible, see report my conversation Mr. Ford yesterday as to connection between this order and further contracts stop. Confirm that you can handle all sizes mentioned above. Weaver."

Lieut. Weaver testified concerning his talk with C. T. Ford on October 3, 1918:

"Mr. WEAVER. To the best of my recollection I told him (Mr. Ford) this, that the Army ordnance was not accustomed to—was not



able to and did not take up and hand over a contract for 10,000,000 pounds of rods in this kind of a situation; that we only put and placed actual contracts for smaller amounts if we received the authorizations to so purchase; that we could not place a blanket order for 10,000,000 pounds of rods because at the time we had no valid authorizations covering that amount because at the time we did not know what would be the sizes required for that amount nor the delivery points, and I think I mentioned that the price had not been agreed upon for the full amount.

"Capt. FRAZER. Did you or not tell him that in all probability they would receive orders up to their capacity?"

"Mr. WEAVER. What I told him was more nearly this, that I proposed in the near future to go over and cast up an estimate of our future rod requirements into the first six months of the year 1919, and issue to the Mueller Metals Co. a letter or preliminary option agreement for the amount of their allotment, and then I stated in a general way, to the best of my recollection, that the future requirements for rods, as they appeared to me at that date, seemed to indicate that the capacity of the Mueller Metals Co. rod mill would be utilized to the fullest extent. \* \* \*

"Mr. WEAVER. There was no blanket order ever issued for 10,000,000 pounds. There was no blanket order, in the sense of preliminary option agreement, ever issued. There was issued an individual contract for 1,000,000 pounds of rods. \* \* \*

"Capt. FRAZER. Was or was not that prior to Mr. Ford's visit to you?"

"Mr. WEAVER. That was prior.

"Capt. FRAZER. On the occasion of your going over the matters that had occurred in the brass field prior to your return, did Capt. Gordon state to you or did he instruct you to issue an order for 10,000,000 pounds of rod to the claimant?"

"Mr. WEAVER. No."

\* \* \* \* \*

"Q. Did you say anything further about the terms of that letter?"

"Mr. WEAVER. To the best of my recollection, the general substance of the letter was explained, that it was not an order, but was intended to consummate an option agreement, whereby the Army Ordnance agreed to place, if artillery munitions requirements warranted it, a certain amount of orders with the Mueller Metals Co. over a certain period, and in consideration for which the Mueller Metals Co. agreed to take such orders and produce material. \* \* \* It was a form letter—or, it was a letter written in the first instance by myself in July and issued to practically every brass rod manufacturer in this country. The letter to each manufacturer was in substance the same, containing the same general provisions and provisos, varying in the minor details and varying as between the contractors perhaps as to some minor details, and, of course, as to amounts, deliveries and prices. \* \* \* To the best of my recollection, I said this, 'Mr. Ford, we do not here pick up and hand out to you a valid order for 10,000,000 pounds of rods. We only place individual contracts for lesser amounts and our authorizations to purchase are given to us, but we do estimate our future requirements and cover them by the issuance of a letter, called a preliminary option agreement letter,



which covers in a general way the aggregate amount of poundage, which the Army Ordnance proposes to place with the contractor within a certain long period of time.' \* \* \*

"To the best of my recollection, I stated that it would not be an order. It was, of course, regarded in our office as official as far as its effect went, but in effect it was not an order, and I believe I made that clear to Mr. Ford.

"Mr. MOHUN. As I understand your testimony, you do not wish to be understood as swearing positively that you actually mentioned the words 'option agreement' or 'option letter,' to Mr. Ford in the interview. Is that correct?

"Mr. WEAVER. No; I would not swear that those precise words were mentioned. \* \* \* It was not my general practice to use the phrase 'blanket requirement order' and it is my impression that that phrase was not used in my conversation with Mr. Ford."

7. On October 4, 1918, Lieut. Weaver wired claimant that he was placing an order with claimant for 1,000,000 pounds of brass rods. In reply on October 7, 1918, the claimant wrote Lieut. Weaver, as follows:

"1. We acknowledge receipt of your wire as follows: 'Answering wire fourth brass rod placing with you today order for one million pounds size  $1\frac{1}{4}$ ,  $13/16$ ,  $3/4$ ,  $17/32$ ,  $13/64$ , point 380-inch 640-inch stop. Deliveries, carload a week starting soon as possible. See report my conversation Mr. Ford yesterday as to connections between this order and further contract stop. Confirm that you can handle all sizes mentioned above.'

and we wish to confirm that we can handle all of the sizes mentioned immediately, with the exception of  $13/64$ " and the .380" and these we will not be able to ship before thirty days.

"2. We note your reference to conversation with Mr. Ford and we have a letter from him, stating that you will give us a blanket order covering all the rod that we can furnish up to July 1st, and that *this order will not be official* stating definite quantities, but official orders will follow from time to time to cover the material on the blanket order.

"3. We are proceeding with this idea in view by putting on an extra shift in our rod mill, increasing our casting of billets, and will run to capacity on  $1\frac{1}{4}$ "  $13/16$ " and  $\frac{3}{4}$ " until we have definite orders covering sizes and quantities.

"4. We note that you ask us to ship a carload a week and we ask you to give us shipping instructions on these shipments as soon as possible. We do not believe, however, that a car a week will at all cover our capacity but we feel that a carload every day or every other day at the most, will be more nearly what we can do, although we will start on the basis of one car a week.

"5. We thank you for your wire and hope that the confirmation will come through promptly. We are,"

8. On October 15, 1918, Capt. Gordon wrote the claimant as follows:

"1. I am directed by the Chief of Ordnance to acknowledge your letter of October 11th (our file P470 .13/5123) confirming that you

can handle all sizes of the proposed new order with your company for 1,000,000 lbs. of brass with the exception of the 13/16" and .380" sizes which you will not be able to ship before thirty days.

"2. The Mueller Metals Co. is advised that a contract is being issued calling for the following material:

Amount.	Size.	Material.
597,700 lbs.....	1 1/8"	Round brass rod.
258,100 ".....	1 1/8"	" " "
58,900 ".....	1 1/8"	" " "
32,500 ".....	.640"	" " "
27,000 ".....	1 1/8"	" " "
27,200 ".....	.380"	" " "
1,000,000 " total.		

"3. Shipments are to go forward to the American Multigraph Co., Cleveland, Ohio, at the rate of 50,000 lbs. per week, starting week of October 1st, prorate all sizes, with the exception of the .380" size on which shipments are to commence as soon as possible.

"4. Present requirements for brass rods for munitions purposes *indicate* that there is no doubt that the capacity of the Mueller Metals Co. for the manufacture of brass rods, can be used to the maximum, either in connection with direct Army Ordnance purchases or purchases by Army Ordnance contractors for the fabricated parts.

"5. This division understands that there are now large requirements in the Middle West for 5/8" round and 1/2" hexagon rods for use in rifle grenades. If the Mueller Metals Co. can manufacture these sizes it is suggested that it get in touch with the following firms:

"1. Cutler Hammer Co., Milwaukee, Wis.

"2. Briggs & Stratton Co., Chicago, Ill.

"3. Westinghouse Electric & Mfg. Co., East Pittsburg, Pa."

9. On October 24, 1918, Capt. L. S. Gordon wrote the claimant as follows:

"1. I am directed by the Chief of Ordnance to request the Mueller Metals Company to submit an estimate of its open capacity for the manufacture of brass rods for delivery during the following months:

"(a) November.

"(b) December.

"(c) January.

"(d) February.

"(e) March.

"(f) April."

10. On November 2, 1918, claimant replied to said letter as follows:

"1. Your letter of October 24, P470.13/5610, War Ord. P. 13896-3874A, is received and in reply thereto we beg to give you a conservative estimate of our open capacity for the manufacture of brass rod for delivery in the months named as follows:

(a) November.....	None.
(b) December.....	1,000,000
(c) January.....	1,000,000
(d) February.....	1,000,000
(e) March.....	1,000,000
(f) April.....	1,000,000

"2. We have every reason to believe that one and one-half million pounds is nearer our real capacity according to our actual production at the present time, and you are safe in considering the above a most conservative estimate."

11. During October, 1918, 2,000,000 pounds of raw material—copper and spelter—were sent to claimants by the Ordnance Department to be used in the manufacture of brass rod under such orders as the claimant might receive from the Government.

12. Pursuant to directions received from the Secretary of War the claimant was called upon to prove what expenditures, if any, were incurred in reliance upon the alleged agreement of October 3, 1918. The claimant's attorney stated that it would be a very difficult matter to introduce the necessary evidence, due to the great number of vouchers and other records that would have to be examined in detail, and suggested that the matter was more properly one for auditors to handle. The Board ruled as follows:

"We will ask proof of an agreement as requested, and proof (that) in accordance with that agreement and after the date of that agreement some loss was sustained. If we find that a loss was sustained we will certify the question to the Ordnance Board through the chairman to examine all vouchers and orders and determine just what the loss was after that date.

"Mr. MOHUN (claimant's attorney). That is very satisfactory."

Mr. Fred L. Riggin, secretary of claimant, then testified that on or about September 28, 1918, Mr. Mueller, president of claimant company, directed him to purchase metal on account of this order for 10,000,000 pounds of rod. That he thereupon made purchases of metal, machinery, and other materials. From the testimony of this witness it appears that metal was purchased in excess of that required by claimant's unfilled firm orders with the United States. It also appears that the claimant suffered a loss through the fact that the market value of said metal fell after the armistice.

#### DECISION.

1. The question at issue is whether the claimant was promised a firm order for 10,000,000 pounds of brass rod or whether it was informed that 10,000,000 pounds of brass rod would be allocated to it subject to Government requirements. Considerable testimony as to what was said upon this subject on September 26 and October 3, 1918, has been taken, but the testimony is conflicting. Mr. Mueller stated:

"His (Captain Gordon's) exact words were: 'I will give you an order for 10,000,000 pounds.'"

Capt. Gordon states:

"I told them Lieut. Weaver would specify and furnish individual orders as we required the material."

Mr. Weaver states:

"To the best of my recollection I told him (Mr. Ford) this, that the Army Ordnance was not accustomed to, was not able to, and did not take up and hand over a contract for 10,000,000 pounds of rod in this kind of a situation; that we only put and placed actual contracts for smaller amounts if we received the authorizations to so purchase; that we could not place a blanket order for 10,000,000 pounds of rod because at the time we had no valid authorizations covering that amount." \* \* \*

2. In view of the conflicting testimony, it becomes necessary to look into the surrounding circumstances with a view to determining which version is the more plausible. Mr. Mueller, president of claimant company, was seeking orders for brass rod. Brass rod is a component part used in the manufacture of munitions. The Government was supplying brass rod to munition manufacturers. The amount of rod required depended upon the amount of munitions to be made. Copies of munition contracts were forwarded to Capt. Gordon, who determined the rod requirements by an examination of said contracts. It was Capt. Gordon's custom to order rod as soon as a munition contract was placed. On September 26 and October 3, 1918, 10,000,000 pounds of rod was not needed. Capt. Gordon knew, however, that the Government would be able to use more than that amount prior to July, 1919, provided the fuse program was not curtailed. Capt. Gordon made it a practice to estimate probable requirements in advance and to inform the rod manufacturers of the amounts which he expected to order from them within the designated period.

3. Following the conference of September 26, claimant's representative, Mr. Ford, called upon Lieut. Weaver. Mr. Ford states that his purpose was to get the order for 10,000,000 pounds. He admits that Lieut. Weaver explained to him that it would be impossible to place this 10,000,000-pound order for the reason that they did not have authorizations covering that amount. It is apparent from the testimony that Lieut. Weaver attempted to explain to Mr. Ford that the order was contingent upon Government requirements. Mr. Ford's letter to Mr. Mueller under date of October 4, 1918, states:

"Weaver said that it would be impossible for them to give any such order. He could only order as it is authorized. However, he will give you a blanket requirement order covering all that you can furnish up to July 1st.

Lieut. Weaver had in mind a definite procedure which was followed by his office as a matter of routine. It may be that Mr. Ford did not grasp the full significance of what he termed a blanket requirement order and which Lieut. Weaver terms a preliminary optional agreement, but the fact remains that Mr. Ford admits that Lieut. Weaver told him that it was impossible to give the 10,000,000-pound order. This lends weight to Lieut. Weaver's position as indicating that the order was being handled by him in the usual routine manner, and taken in connection with the fact that no reason appears for handling the matter in an unusual manner, it seems that full weight might well be given to the testimony of both Lieut. Weaver and Capt. Gordon. The claimant's witnesses are interested parties. Assuming, however, that they have testified in accordance with their recollection of what occurred, there is still a question as to whether at the time of the negotiations referred to claimant's witnesses fully grasped the distinction which Capt. Gordon and Lieut. Weaver made between an allotment and a definite order. If they did not fully grasp the distinction, it is natural that the phraseology distinguishing the allotment from a definite order should be lost from their recollection because of its apparent unimportance.

4. This Board is of the opinion that the negotiations of September 26 and October 3, 1918, did not result in the placing of a firm order for 10,000,000 pounds of brass rod. The minds of the parties did not meet upon this subject and no contract arose. The negotiations referred to resulted in an allocation to the Mueller Metals Co. of 10,000,000 pounds of brass rod against which orders were to be placed in the event that said rod should be required by the Government.

5. In view of the above holding the Ordnance Department has not been called upon to make a detailed examination of claimant's expenditures.

6. The decision of this Board under date of November 24, 1919, wherein relief is denied, is hereby affirmed.

Col. Delafield and Mr. Fowler concurring.

JUNE 30, 1920.

Case No. 2606.

*In re* CLAIM OF NEW YORK CENTRAL RAILROAD, WALKER D. HINES,  
DIRECTOR GENERAL OF RAILROADS.

1. **RAILROAD FACILITIES—GENERAL ORDER 15 OF RAILROAD ADMINISTRATION.**—Under the act of March 2, 1919, the Government is under no implied obligation to reimburse a railroad for construction of tracks on its own right of way for the purpose of supplying a Government manufacturing plant with proper railroad facilities. Nor does such an implied obligation arise from General Order 15 of the Railroad Administration providing that "generally speaking an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own that part of the track on the right of way from the clearance point to the right of way line," a Government manufacturing plant coming within the exception referring to special cases.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$426.21 based upon an implied agreement in relation to the construction of a siding to a Government plant at Willoughby, Ohio. The decision of the Claims Board, Transportation Service, denying relief is affirmed.

Mr. Henry writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Transportation Service, on a claim for \$426.21, as amended, by reason of an agreement alleged to have been entered into between the claimant and the United States, within the meaning of the act of March 2, 1919.

2. The Claims Board, Transportation Service, held that the record shows that there was no express agreement that this claim should be paid by the Government, and fails to show facts and circumstances that would give rise to an implied agreement on the part of the Government to pay for the construction.

3. From this decision the claimant appealed to the Board of Contract Adjustment. Upon this appeal a hearing has been had.

4. Under date of September 18, 1918, W. G. Wilcox, lieutenant colonel of the Chemical Warfare Service, United States Army, wrote to the claimant, inclosing a blue print, requesting the construction of certain sidetracks at Willoughby, Ohio, to serve a plant which the Chemical Warfare Service had taken over at that point. The blue print gave the desired location of the tracks. There was also



inclosed a Treasury check for \$3,500, "to serve as a guarantee for payment on this siding."

5. The railroad constructed the siding in accordance with the request and claimed reimbursement for the expense of construction from the point where the sidetrack cleared the main track of the railroad up to the plant it served. The Government paid the expense of that portion of the sidetrack which lay outside of the railroad right of way, but declined to pay for that part which, although outside the main track of the railroad, yet was constructed on the right of way.

6. Under date of February 6, 1919, the Government tendered to the railroad a written agreement purporting to cover the operation, but limiting the Government's obligation to reimbursement of the expense of the construction of the sidetrack outside the right of way. This the railroad declined to sign.

7. The amount of trackage involved in this case is insignificant. The plant which was used by the Chemical Warfare Service has been purchased by a private industry and is being used by that industry. It happens that at about the point where the track under consideration leaves the railroad right of way it divided into two tracks, one leading west of the factory site and one east. The industry desires the eastern branch, and that is to be permanent. The western branch has been removed with the exception of the switch on the railroad right of way by means of which the western spur separated from the eastern. On the blue print furnished by the railroad this is marked as 40 feet.

8. The point of clearance of the western spur from the eastern seems to fall outside the railroad right of way. It is measured on the rail inside the two tracks of the eastern spur, and is a point half-way between that at which the rail leaves one rail of the other track and that at which it crosses and leaves the second rail of that track.

9. Counsel for the railroad offered in evidence General Order No. 15 of the Railroad Administration, dated March 26, 1918, and Supplements Nos. 1 and 2, dated December 5, 1918, and August 9, 1919.

10. That part of General Order No. 15 which is applicable to this case reads as follows:

"The following requirements must be observed in respect of the construction, maintenance, and operation of new industry tracks and in respect of the operation and maintenance of existing industry tracks:

"1. As to new industry tracks:

"(a) The industry shall pay for, own, and maintain that part of the track beyond the right of way of the railroad company.

"(b) The railroad company shall pay for, own, and maintain that part of the track on the right of way from the switch point to the clearance point.



"(c) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right-of-way line."

11. Supplement No. 1 to General Order No. 15, dated December 5, 1918, reads in part as follows:

"In cases where, in the judgment of the Federal manager, the circumstances justify the construction of an industry track but the amount of revenue to be derived therefrom by the United States Railroad Administration does not justify the payment by the Director General of the cost of that part of the track on the right of way from the switch point to the clearance point, an agreement may be made, otherwise in accordance with General Order No. 15, but providing for the payment of the entire cost of the track by the shipper with a provision for refund up to but not exceeding the cost of the part of the track from the switch point to the clearance point at the rate of two dollars (\$2.00) per car of carload freight yielding road-haul revenue delivered on or shipped from the track during Federal control."

12. Supplement No. 2 to General Order No. 15, dated August 9, 1919, reads as follows:

"General Order No. 15, dated March 26, 1918, is hereby supplemented as follows:

"Paragraph 2 of General Order No. 15 is hereby changed to read as follows:

"2. Where existing industry tracks are not covered by written contracts they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof. In the absence of a written contract as to the maintenance of an industry track constructed prior to March 26, 1918, the practice of the connecting carrier prior to Federal control as applied to such track of any particular industry from the beginning of its use by such industry shall be considered as equivalent to a written contract in accordance with such practice."

13. June 15, 1917, the Secretary of War notified all railroads through The Adjutant General that the Government would not pay for connecting links between Government reservations and railway systems, and declared that in accordance with prior custom the railways would be required to bear the cost thereof. He specifically denied to all constructing quartermasters authority to obligate the Government for such costs, so that if any contract was subsequently made under which it was attempted to obligate the Government to pay for such trackage, it was an unauthorized contract and is not binding upon the Government, since the Government agents and the carriers both had notice of the limitations upon the former's authority.

14. June 28, 1917, Fairfax Harrison, the chosen representative and agent of the carriers, accepted by letter of that date the ruling of the

Secretary of War, and henceforth there was no question in issue save as to payment for trackage on the Government reservation.

15. The foregoing interpretation was the understanding of the Railroad Administration, as shown by a letter of Mr. Hodges, dated July 8, 1918, written four months after the publication of General Order No. 15. Mr. Hodges, assistant to the Director General of Railroads, in summarizing the claims of the carriers, declared:

(a) The War Department should bear the expense of *constructing* all tracks within the limits of camp reservations which have been or will be constructed subsequent to December 31, 1917.

(b) The War Department should bear the expense of *maintaining* all tracks now or hereafter laid upon *camp reservations*.

(c) A similar ruling should apply in connection with trackage serving factories and other War Department facilities.

#### DECISION.

1. It was urged by the attorney for the Government that as the railroad concedes that under the rulings of the Railroad Administration it is not entitled to compensation except from the point of clearance, that as the point of clearance in this case falls outside the right of way, there is nothing for which it is entitled to be compensated. The railroad's answer is that there is only one point of clearance—that from the main track—and that sidetracks and spurs do not have points of clearance. It is believed, however, that it is not necessary to decide that point, as the rights of claimants should be determined as of the date the construction of the sidings was requested. The subsequent making of the eastern spur permanent, while it relieves the Government from payment for such spur, does not relieve it from the obligation to pay for the switch leading off to the other spur if it was under such an obligation prior to such event.

2. This Board holds, in agreement with the Claims Board, Transportation Service, that there was no express agreement to pay for the track in question. Further, the inclosure of the Treasury check for \$3,500 in the letter of September 18, 1918, from Lieut. Col. W. G. Wilcox, "to serve as a guarantee for payment on this siding," is not sufficient to raise an implied agreement to pay for a portion of the track in question. There was no question but what the Government was bound to pay for such part of the siding as was on the land belonging to the factory, and the check was sent for that obligation.

3. The claimant's right to recovery in this case, if he has any, must arise out of an implied agreement. We come, therefore, to the effect of General Order No. 15 of the Railroad Administration and the supplements thereto, as above quoted. It is contended by counsel for the claimant that that order lays down the rule which governs this case. for the reason that it was promulgated on March 26, 1918,

and the siding in question was requested on September 28, 1918, while the order was still in force.

4. The relationship between public carriers and the public is a peculiar one. There is opportunity for the carrier to take advantage of the public by reason of its monopoly. Its services are a necessity. It is, therefore, necessary for the Government to take a hand and regulate the carrier's services. The Railroad Administration acting in behalf of the public, as well as for the carriers, promulgated the rules laid down in General Order No. 15. It said what contract terms between the carrier and industries for siding would be permitted. It was laid down that it was proper for the industry to be required to pay for and maintain that part of the track beyond the right of way of the railroad company, and that the carrier should pay for that part of the track on the right of way from the switch point to the clearance point.

5. In paragraph (c) it was said that "generally speaking" an industry could also be required to pay for and maintain that part of the track on the right of way from the clearance point to the right-of-way line. But it was further said, "although in special cases the railroad company may do so." It is believed that the intention in this paragraph was to leave the parties, i. e., the carrier and the industry, free to contract with reference to such part of the track provided the equities of the case were taken into consideration.

6. Both Supplements 1 and 2 to General Order No. 15 were issued at dates subsequent to the letter of September 18, 1918, and are not pertinent if they in any way modify the order. It is only legitimate for us to use them to throw light on what may be ambiguous in the order. Supplement No. 1 is not in point, as it has reference to payment for the part of the tracks from the switch point to the point of clearance. The railroad admits that it should pay for such part under paragraph (b) of General Order No. 15. Supplement No. 2 does not help us much. It first provides that where there is no written contract the rights of the parties are to be determined by paragraph 1 of General Order No. 15. That leaves the matter still open, if, as in this case, it falls under subparagraph (c). The supplement then goes on and gives the rule in the absence of a written contract prior to March 28, 1918, which does not concern us here. There is, however, a strong inference to be derived from the rule to the effect that the previous understanding or practice continues to govern after March 28, 1918, with respect to such matters as were not determined by General Order No. 15.

7. The general understanding between the War Department and the railroads as to payment for tracks leading up to the camps and cantonments is shown by the letter from The Adjutant General of

the Army of June 28, 1917, as representing the carriers. It may be objected that such understanding had reference only to camps and cantonments and not to factories. It is believed, however, that such was the understanding between the Government and the railroads with reference to all Government owned or operated sites requiring railroad facilities, and specifically that it applies to industries. That is shown by the understanding of the matter by the Railroad Administration as indicated in the letter of Mr. Hodges dated July 8, 1918. The relationship between the War Department and the carriers is one of the "special cases" referred to in paragraph (c) of General Order No. 15.

8. Subparagraph (c) does not mean that in the absence of an express agreement the cost should fall upon the industry. If the rights of the parties are not expressly determined it becomes necessary to revert to the general understanding or practice between them, and this Board finds that such understanding was that the Government would pay for that portion of the track on its own property and that the carrier would pay for that on its own right of way.

9. The decision of the Claims Board, Transportation Service, is affirmed.

#### DISPOSITION.

This case will be returned to the Claims Board, Transportation Service, for action in accordance with this opinion.

Col. Delafield concurring.

JUNE 30, 1920.

**Case No. 1502.**

*In re* **CLAIM OF REPUBLIC IRON & STEEL CO.**

- 1. STIMULATION OF PRODUCTION BY WAR INDUSTRIES BOARD.**—Where claimant was urged by the Steel Section of the War Industries Board to increase its monthly production of shell steel and thereupon purchased materials and facilities with a view to such increased production, such stimulation of production for general war purposes does not amount to an agreement within the meaning of the act of March 2, 1919, to compensate claimant for losses on such materials and facilities due to the intervention of the armistice.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$240,422.68, based upon an alleged agreement in relation to projectile steel. Held, claimant is not entitled to relief.

Mr. Henry writing the opinion of the Board.

This claim arises under the Act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17 of 1919 for \$240,422.68 by reason of an agreement alleged to have been entered into between the claimant and the United States of America.

A hearing was held on March 1, 1920, and continued on March 4, April 27, May 14, and May 24, 1920.

**FINDINGS OF FACT.**

1. Claimant is a corporation organized and existing under the laws of the State of New Jersey.

2. J. Leonard Replogle at the times hereinafter mentioned was director of steel supply of the War Industries Board. Any and all authority over steel or steel products, their production or allocation, which the War Industries Board or its chairman, Bernard M. Baruch, possessed, were delegated by Mr. Baruch to Mr. Replogle. Frank Purnell was assistant director of steel supply.

3. During the year 1918 claimant was engaged in performing a number of Government contracts for shell steel. In the summer of 1918 the total monthly production of shell steel in the United States was in the neighborhood of 350,000 tons. The estimated requirements of the United States and associated powers called for the production of between 600,000 and 700,000 tons monthly. The Steel

Section of the War Industries Board was therefore constantly bringing pressure upon steel manufacturers to increase their output.

4. Claimant's production of steel shell monthly in July, 1918, ran from 10,000 to 12,000 tons a month. Wilbur Topping, claimant's general manager of sales, was in Washington during the period from May, 1917, to November, 1918, two or three days every week, and was constantly in communication and conference with Mr. Replogle and his assistants. Mr. Replogle on a number of occasions expressed to Mr. Topping his belief that claimant was capable of producing more projectile steel than it was then producing.

5. Messrs. Baruch, Topping, Replogle, and Purnell were all witnesses upon the hearings held herein.

While the witnesses who participated in the interviews upon which claimant relies for the establishing of the agreement under which it claims agreed in all substantial particulars as to the substance of the conversations, none of them was definite in his recollection of dates or of the exact language used. The following excerpts upon which claimant relies as establishing an agreement in its favor within the act of March 2, 1919, are therefore quoted at length:

"Mr. ROBERTSON (Government attorney). \* \* \* You have been called as a witness to testify in order that you might explain to the Board any recollection that you may have of this particular transaction with the Republic Iron & Steel Company.

"Mr. REPLOGLE. \* \* \* I do recollect Mr. Topping, of the Republic Iron & Steel Company coming to see me *at my solicitation*. I felt that the Republic Iron & Steel Company was not getting as much tonnage of projectile steel as they could get, and I told him so on several occasions. \* \* \* The weak links in our steel chain at that time were steel plates and projectile steel. The war necessities in those lines were approximately double the output of the various mills, and we appealed to the Republic Iron & Steel Company \* \* \* for a heavier tonnage.

\* \* \* \* \*

"As I have said in that letter to Mr. Topping, I do feel that they were justified in providing for sufficient raw materials to produce this 16,000 tons."

\* \* \* \* \*

"Mr. ELLIS (of claimant's counsel). \* \* \* When you were dealing with a product like projectile steel, where the demand so far exceeded the supply, in that case any manufacturer to whom you told that he must produce so much, a given quantity, had no doubt whatever that formal contract for that amount would come forward?

"Mr. REPLOGLE. I think that is true."

"Mr. REPLOGLE. I want to say here that in doing that I think it would be more or less unfair to the steel manufacturers, if we did not assume *we were bound*, because in many cases the confirming



order came from the governmental agency months after the steel manufacturers had been instructed to produce.

"Mr. JONES. After we had shipped the steel?"

"Mr. REPLOGLE. Really in many cases after the steel was shipped."

\* \* \* \* \*

"Mr. BARUCH. I do not think that is much of a point for you to make, because as a matter of fact the War Department never could catch up with its contracts. These people were absolutely bound by their contracts, and would not accept orders on the say-so of people, because they could never get the orders to sign. In handling these matters, my opinion is that you ought to take each case separately. You have to judge each case on its merits, and you have that authority under the Dent Act."

\* \* \* \* \*

"Mr. ELLIS. So, if you told any producer to make any given quantity, even though it was up to his limit, there was no question but what the Government stood ready to take all of that steel, is not that right?"

"Mr. PURNELL. Yes, sir; that is, from the estimates and statements they had given us as to what we would require."

\* \* \* \* \*

"Mr. ELLIS. When did the producer begin to produce, or when was he required to make his preparations? When you ordered him to do so, or did he wait until contracts came on?"

"Mr. PURNELL. He prepared in advance of contracts."

"Mr. ELLIS. Upon whose order?"

"Mr. PURNELL. The director of steel supply."

"Mr. ELLIS. That was the regular custom of your department, was it not?"

"Mr. PURNELL. Yes, sir."

\* \* \* \* \*

"Mr. JONES. So that when you gave the order to the steel producer to produce so many thousand tons per month, your section believed from that moment that the Government was bound?"

"Mr. PURNELL. I did; yes, sir."

"Mr. ELLIS. So far as any contracts, signed contracts, with any of the departments were concerned, was there ever any question about their following, once you had made the allocations?"

"Mr. PURNELL. Whether (whenever) the allocations were made—that is, on a requisition for steel, we made an allocation, and I never knew of a case where the War Department did not recognize that as an order."

"Mr. BARUCH. \* \* \* Mr. Replogle must have gotten his instructions for the purchase of 16,000 tons a month from somebody in the War Department, or he would not have issued them. That must be certain. He would not order these people to produce shell steel unless there was a demand for it, and that demand occasioned on the part of the War Department. Mr. Replogle had associated with him on the steel committee a representative of the War Department as he did of other departments, and these allocations for various productions of materials were never given *except with the approval of all parties concerned*.



"Mr. BARUCH. \* \* \* So that any order Replogle might have given doubtless was authoritative.

"Mr. BARUCH. I do not know whether in this particular instance he may have gone further than in some other instance. We were in a very desperate condition about that time. Certain shells were very low and they had gone down from thirty to thirteen million, that is, the reserves in France, and we had to get the shell steel and ship it over there direct to make the shells." \* \* \*

"Mr. REPLOGLE. We assumed that the letter of March 4 gave Mr. Baruch almost unlimited authority, from the Commander in Chief of the Army and Navy, under his war powers."

6. Claimant, relying upon the directions of Mr. Replogle, entered into commitments for large amounts of ferrosilicon and fluorspar which are materials used in large quantities in the production of projectile steel but in very small quantities in the production of commercial steel. The quantity of these materials so ordered was far in excess of what claimant could use in its commercial business for a considerable time to come. Furthermore, it ordered from the McClintic-Marshall Co. two hot saws and tables for installation at its open-hearth works. These hot saws were of no use to it in its commercial business, and subsequently to the armistice it entered into an arrangement with the manufacturer for their return upon a payment to the latter.

7. Cleveland District Claims Board, Ordnance Department, has recommended an adjustment of this claim in the sum of \$240,422.68.

#### DECISION.

1. While the statements of Mr. Replogle to Mr. Topping undoubtedly were of such a nature as to justify a prudent business man in making the necessary commitments for increased production, this Board is of the opinion that nothing has been shown in this case which establishes an agreement on the part of any duly authorized officer of the Government that the latter would make good any loss that claimant might sustain in case the anticipated orders did not materialize. From its very nature, the demand for shell steel in large quantities was conditional upon the duration of the war. At the time of the negotiations which culminated in claimant's entering upon the commitments by reason of which it considers itself entitled to reimbursement no probable end of the war was in sight. There was, therefore, every prospect that it would receive orders for all the shell steel which increased facilities enabled it to produce and be enabled to amortize the cost of the latter without difficulty. The unexpected cessation of hostilities prevented its doing so and resulted in a financial loss.

Nothing has been presented to this Board which in its opinion establishes any guaranty by any officer authorized to bind the Gov-

ernment financially that the war would last a sufficient length of time for claimant to amortize the expense to which it was urged to go, or that the Government would insure it against loss arising out of the transaction.

It must have been contemplated by the parties that the war would end at some time, and it would necessarily follow that the abnormal requirements for shell steel would stop then. The risk of such termination of the war coming sooner than was anticipated would naturally be one which the contractor would assume unless the Government expressly agreed to do so.

2. The evidence fails to show a definite agreement of any kind. It should be noted that Mr. Replogle did not say in his testimony above quoted that he asked the claimant to produce 16,000 tons per month. He said he appealed to the Republic Iron & Steel Co. for a heavier tonnage, and that he felt "they were justified in providing for sufficient new materials to produce this 16,000 tons." Our conclusion is that what Mr. Replogle did was to stimulate increased production. He informed claimant that the need for steel plates and projectile steel was about twice as great as the monthly output and he urged claimant to produce more per month in order to do its share toward increasing the total output. Such an appeal by Mr. Replogle does not constitute an offer which could be accepted by increasing the output, thereby making a contract obligating the Government to take and pay for such increased output regardless of whether the Government under changed circumstances would require it. It is believed that it was not intended as an offer, nor was it looked upon as such by the claimant.

3. This case differs from *New Orleans Can Co.* No. 29 (Vol. I, Decisions of Board of Contract Adjustment, 163) in that in the case cited the order to the contractor upon which this Board found an agreement in its favor was given by an officer of the Quartermaster Corps by direction of the Quartermaster General of the Army. The same element is present in *Heekin Can Co.* No. 70, Vol. I, 328; *Carnie-Goudie Mfg. Co.* No. 444, Vol. I; *Roberts Brass Mfg. Co.* No. 193, and *Aluminum Castings Co.* No. 517. This Board has uniformly refrained from holding that it has jurisdiction over a set of facts arising from an act, request, or direction of the War Industries Board unless it is clearly made to appear that in performing such act, making such request, or giving such direction the War Industries Board was acting as the agent of the War Department, and that the purpose was a War Department purpose. The usual and reasonable evidence that the War Industries Board's action in a given case was for a purpose of the War Department is that some officer or employee of that department was in some way directly

involved in the transaction. This nowhere appears in the case under consideration. The War Industries Board made allocations of shell steel not only for the use of the Army, but also for that of the Navy and for foreign Governments. This Board has no jurisdiction over claims against any of these, other machinery having been provided for the adjustment of such claims. There is nothing in the record in this case to show that the increased production expected from the Republic Iron & Steel Co. would eventually have been allocated to the United States Army. The fact that Maj. Gen. Goethals was a member of the War Industries Board has apparently no materiality, as it is not shown that he personally or any of his agents ever took any part in the negotiations between claimant and Mr. Replogle upon which the alleged agreement is predicated, or knew anything about them.

Mr. Replogle paid high tribute in his testimony to the patriotism of claimant's officers and to the willingness which this company showed at all times to assist in carrying out the Government program. It is regrettable that its efforts to aid in bringing about at an unexpectedly early date the military success of this Government and its associates should have entailed a financial loss upon it. This Board, however, is without power to compensate it therefor.

#### DISPOSITION.

This Board will enter the usual final order denying relief.  
Mr. McCandless concurring.

JUNE 30, 1920.

**Cases Nos. 2536 and 2537.**

*In re* **CLAIM OF SALISBURY WHEEL & AXLE CO.**

**1. SUSPENSION OF CONTRACT—OVERHEAD EXPENSES, HOW ALLOCATED.—**

Where claimant's contracts for the manufacture of 500,000 shell and 520,000 adapters were suspended when partly finished, apportionment of overhead expenses such as maintenance of plants, tools, dies, jigs, insurance, timekeeping expense and supervision of labor should be allocated in proportion to direct labor in adjusting claimant's loss by reason of such suspension.

**2. SAME—RECOUPMENT.—**Where claimant's contract for the manufacture of 520,000 shell adapters was suspended when only 64 per cent completed and the costs then exceeded the contract price claimant is entitled to receive such recoupment of such costs as it can show it would have made if allowed to complete the contract.

**3. SAME—RENT.—**The claimant is not entitled to rent on its premises charged as a part of its overhead expenses in the adjustment of a suspended contract, where it is not shown that the premises were especially provided for the performance of such contract.

**4. SAME—INTEREST.—**The claimant is entitled to reimbursement for an amount equal to the amount of any interest which accrued by reason of such delay, provided, however, that there shall be deducted from the amount so allowed on account of interest the amount of profit, if any, which the claimant derived from the use of the Government loan during such period of delay. (Denby Motor Truck Co., No. 150-G-1555. Decisions of this Board.)

**5. CLAIM AND DECISION.—**Two claims aggregating \$346,144.72 arise under written contracts on appeal from the decision of the Ordnance Claims Board. Held, that claimant is entitled to relief in part.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. These are appeals from two awards of the Ordnance Claims Board under circumstances which hereinafter appear.

2. Under date of February 1, 1918, the claimant entered into a contract, No. P2609-1381A, with the Government for the manufacture of 520,000 adapters for 3-inch A. A. shells at \$0.38 per adapter.

3. Under date of August 6, 1918, the claimant entered into a contract, No. P13060-3243A, with the Government for the manufacture of 500,000 3-inch shells at \$1.75 per shell.

4. The claimant proceeded with the performance of the first contract and later with the performance of both contracts in one wing of its factory.

5. Shortly after the armistice the claimant was notified to suspend work on its two contracts.

6. At the time of the suspension of the contracts the adapter contract had progressed to about 64 per cent completion and the shell contract to 6½ per cent completion.

7. Each contract contained a clause permitting termination and in such event making provision for reimbursement in certain particulars.

8. Such termination clauses included also the following sentences: In the adapter contract:

“To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract.”

In the shell contract:

“The 10 per cent of cost herein allowed shall be subject to such addition as the contracting officer may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under the contract.”

9. The first point upon which the present appeals are based relates to the method used by the Rochester District Ordnance Board in determining reimbursement for overhead expense.

10. The method is as follows:

The local board first determined the percentage of gross overhead to direct labor on both contracts. They found this to be 146 per cent. They then allocated the overhead to the two contracts in proportion to the amount of direct labor expended upon each.

11. The gross amount of overhead expense was found to be \$129,300.50. The cost of direct labor upon the larger or shell contract was found to be \$35,000.

12. The Board, therefore, made the allowance for expenses in connection with the shell contract (in round numbers) as follows:

Direct labor.....	\$35, 000
Overhead (at 146 per cent).....	50, 000
Administrative expenses.....	9, 000
Materials spoiled in process.....	5, 000
Amortization of machinery.....	9, 000
Traveling expenses .....	2, 000
Interest on loan.....	10, 000

13. The total amount allowed on the shell contract under the method described in the preceding paragraph was \$122,430.33. The contract price for shells actually delivered under this contract was \$64,294.10. It appeared, therefore, that the contractor in connection

with the shell contract had completed  $6\frac{1}{2}$  per cent at a manufacturing loss of \$58,136.23. This latter sum the District Board and the Ordnance Claims Board allowed the contractor in addition to the amount received by it for deliveries, on the theory that the performance of the first part of a contract is more expensive than the performance of the latter part, and that when a contract is terminated shortly after it is begun, the contractor should not be limited to the contract price for articles produced up to that point, but should be allowed expenses which it would have recouped out of the latter part of its contract if it had been allowed to complete it.

14. The contractor claimed that overhead should be apportioned, not in accordance with the amount of direct labor actually applied to the respective contracts, but in proportion to the respective total contract prices. The total contract price of the shell contract was \$875,000; the total contract price of the adapter contract was \$197,600. The claimant, therefore, in making its own calculations, allocated 81.5 per cent of the overhead to the large contract and 18.5 per cent to the small contract. Under this method of figuring the small contract showed a profit up to the point of cancellation of \$20,000 to the claimant. The claimant having reported this to the Government officials, they made no allowance to the claimant for overhead or "manufacturing loss."

15. If the overhead were to be apportioned between the two contracts in accordance with the method adopted by the local board, the smaller contract would show, up to the time of cancellation, a loss in a very substantial amount instead of a profit of \$20,000.

16. On the theory of apportionment used by the local board, the accountants of the local board calculated that the adapter contract, if it had been carried to completion, would have shown the claimant a loss. In other words, they believed that the contractor could not have manufactured the adapters at the price named and come out whole.

17. It does not follow, however, that the same principle does not apply, to wit, that the performance of the latter 36 per cent of the adapter contract may have been possible at a less proportionate cost than the performance of the first 64 per cent. In other words, it may well be that the claimant might have recouped on the latter part of its adapter contract the whole or more than its loss in connection with the performance of the first part. We understand that the amount of recoupment which the claimant could have made if allowed to complete its contract can be mathematically determined from the data in the possession of the local board.

18. It is not necessary to set out in detail the items included as overhead. It may be stated, in general, that they are largely for salaries of superintendents and foremen, maintenance of plant, ex-



pense of production, time keeping, cost and other similar departments, depreciation on building, traveling expenses, power, water supply, fire, liability insurance, and other similar items.

19. The second item in controversy related to an allowance to the claimant made by reason of a delay in delivery of forgings which the Government was required to furnish to the claimant under the shell contract.

20. This delay approximated six months; that is, from April to October, 1918. The local board calculated the entire value of the claimant's plant, including the machinery and part of the building used in connection with the performance of the contract, and upon this allowed interest at the rate of 6 per cent per annum.

21. The claimant asks reimbursement for rental of its plant at \$5,000 a month during the entire period from the time performance was first started up to the time of termination.

22. The claimant also contended that the allowance in the nature of rent should have been apportioned between the two contracts in proportion to the floor space occupied by the machinery engaged on the two contracts, respectively.

23. During the performance of the contracts the claimant kept no data to determine the exact costs properly applicable to each contract. In order to apportion the rental according to its contention, it would be necessary to determine from time to time the exact amount of floor space occupied by the respective contracts, and no accurate evidence of this was offered by the claimant, although the claimant, through a witness, put in a general estimate.

24. It appeared that the delay by reason of the lack of forgings occurred in connection with the shell contract only, and the allowance of \$8,493.60 was made by the local board in respect to that contract to cover the item of remuneration for carrying the plant.

25. The third item to which the claimant's appeal relates raises the question of the proper amount to be allowed the claimant in connection with interest which it has paid upon Government loans. The War Credits Board loaned to the claimant \$250,000 on the two contracts, part of which had been recouped by the deductions from vouchers for completed units. Whether, in addition to this, claimant had loans from individuals, did not appear.

26. In the allowance for a manufacturing loss of \$58,136.23, the claimant has been credited with \$10,813.31 as interest paid. It did not appear how this sum was calculated.

27. No specific amount of interest has been allowed the claimant on account of the delay occasioned by the failure of the Government to provide material for the shell contract.

28. Both of claimant's contracts provided that claimant's "cost" thereunder should be determined in accordance with the provisions



of the pamphlet entitled "Definition of 'Cost' Pertaining to Contracts" issued by the Office of the Chief of Ordnance under date of June 27, 1917.

29. This pamphlet provided as to interest as follows:

"47. Interest on investment or on bonded debt shall not be considered as an expense entering into the cost of contracts for the United States, but the contracting officer will reimburse the contractor for interest paid by it on money borrowed to finance the purchase of materials necessary to complete contracts for the United States. Interest cost will not be considered as a cost to the contractor upon which profit is to be calculated."

#### DECISION.

1. On the question of apportionment of overhead between the two contracts in question we are of the opinion that the method adopted by the Rochester District Claims Board and approved by the Ordnance Claims Board is just and fair.

2. For example, it seems reasonable to allocate the superintending expenses in proportion to the amount of direct labor superintended. The same may be said of other items, such as general maintenance of the plant, of tools, dies and jigs, insurance, timekeeping expense, and other items covered.

3. The method of division suggested by the claimant, that is, in proportion to the respective gross sums payable under the two contracts if completed, seems to us arbitrary and not founded upon any logical theory. Exact mathematical accuracy is impossible in allocating an expense such as overhead. We think the method adopted accomplished substantial justice.

4. It appears, however, that in the settlement of the adapter contract an allowance has not been made for manufacturing expense such as was made in settling the shell contract. We think it is possible that the claimant, in the performance of the balance of the adapter contract, might have recouped certain of the manufacturing expense to which it was put in the performance of that part of the contract which it actually completed. We find that the claimant is entitled to receive in connection with the adapter contract such recoupment as it can show it would have made if allowed to complete its contract.

5. In connection with rental, it is the rule laid down by the War Department in settlements that the contractor is not allowed for rental of its premises. (P. S. & T. Supply Circular No. 126, Dec. 7, 1918, p. 6.) So far as the Government has been responsible for the delay in performance of the shell contract, we find that the sum allowed by the local board gives fair reimbursement to the claimant for the expense of carrying its plant.

6. The claimant is entitled, in connection with each contract, to an allowance for interest paid on loans in connection therewith, in accordance with the provisions of the pamphlet dated June 27, 1917, hereinabove referred to.

7. The claimant is also entitled to interest paid during the period when the completion of its contract for shells was delayed by reason of the default of the Government, provided, of course, that there shall be no duplication of allowance under this paragraph and paragraph 6 of this decision.

8. The rule laid down by the Secretary of War, in an opinion filed in the matter of the Denby Motor Truck Co., No. 150-C-1555, decision of this Board, is as follows:

The claimant is entitled to reimbursement for "an amount equal to the amount of any interest which accrued by reason of such delay, provided, however, that these shall be deducted from the amount so allowed on account of interest, the amount of profit, if any, which the claimant derived from the use of the Government loan during such period of delay."

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action in accordance therewith.

Col. Delafield concurring.

JUNE 30, 1920.

Case No. 2822.

*In re* CLAIM OF WALTER SODERLING (INC.)

1. **CLAIM AND DECISION.**—This case was originally before this Board as a class B claim in case No. 2257, and on January 27, 1920, this Board rendered its decision and issued certificate Form C, holding, however, that Mr. Soderling had already been paid for his own services. The case was returned to this Board under General Order 103 for determination of a dispute between the Claims Board, Air Service, and the New York office of the Liquidation Division of the Air Service, the latter contending that this Board was in error in finding that claimant had been paid for his personal services. The original decision of this Board is affirmed and the relief now sought by claimant is denied. For the original decision of this Board see Volume III, page 206.

Lieut. Col. McKeeby writing the opinion of the Board.

1. This case was originally before this Board as a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, in case No. 2257, and on January 27, 1920, this Board rendered its decision and issued certificate Form C.

2. In the original decision the Board found as a fact—

“11. In the settlement of the original claim filed by Walter Soderling (Inc.) on June 28, 1919, payment was made for Mr. Walter Soderling's time.”

3. This case was returned to this Board on a dispute between the Claims Board, Air Service, and the New York office of the Liquidation Division of the Air Service, the Liquidation Division of the Air Service contending that paragraph (11) of the findings of fact of the Board of Contract Adjustment in the original case was an error and that the Board of Contract Adjustment was clearly in error in making such a finding.

4. As the question upon which the dispute arises is clearly a matter of interpretation of the settlement contract entered into with Walter Soderling (Inc.) it is unnecessary to have a hearing on this matter, and this opinion is therefore rendered on the facts as disclosed by the record.

FINDINGS OF FACT.

1. In the latter part of 1917 Lieut. E. A. Hults and Dr. J. A. E. Eyster entered into negotiations with the King Optical Co., of New York, for the production of an oxygen mask. At the inception of the negotiations with the King Optical Co. that company submitted to Dr. Eyster and Lieut. Hults a commercial mask that had been perfected by Walter Soderling, and it was suggested that this com-

mercial mask be developed and improved upon for the purposes required by the Air Service.

2. In January, 1918, Mr. Walter Soderling was called into consultation with Dr. Eyster by the King Optical Co. and was authorized by the King Optical Co. to work in conjunction with and under the direction and supervision of Dr. Eyster. The experiments continued, and early in April the mask was perfected.

3. All of the time for experimentation upon the original mask perfected early in April was paid for, including the time of Mr. Walter Soderling, upon vouchers submitted by the King Optical Co. and paid to them.

4. Lieut. Hults, in the hearing, testified:

"Two or three experimental orders were put through."

\* \* \* \* \*

"One of these was given to the Julius King Optical Company, covering development work on masks up to the time the order was placed."

\* \* \* \* \*

"When the bill came in from the King Optical Company it included Mr. Soderling's time and services."

5. The order finally was given to Mr. Walter Soderling, and on April 20 specifications were drawn up, and these specifications changed the original mask as developed by Mr. Soderling, working through the King Optical Co., so that the openings in the masks were to be reinforced by metal eyelets.

6. On or about May 25 Lieut. Hults instructed Mr. Soderling to pay no attention to the specifications calling for metal reinforcement, but to return to the original mask as perfected and get into quantity production.

7. It developed thereafter that Walter Soderling (Inc.), was not able to proceed with production as rapidly as required, and the order originally given to Walter Soderling (Inc.), was canceled and they were paid for all articles delivered.

8. On July 9, 1919, a settlement contract was entered into between the Government and Walter Soderling (Inc.), Articles II and III of which are as follows:

"ARTICLE II. The Government shall pay forthwith to the contractor the sum of seven hundred dollars (\$700.00), which represents the agreed price between the contractor and the Government, covering twelve sets of molds, *changes, and restorations for the manufacture of gas masks*. It is further stipulated and agreed that the contractor has been paid for all finished articles of work heretofore delivered to and accepted by the Government, and this sum of seven hundred dollars (\$700.00) to be paid to the contractor shall constitute full and final compensation for articles or work delivered, *services rendered*, and expenditures incurred by the contractor under said original contract, except as herein provided.

"ARTICLE III. The contractor does hereby for itself, its successors and assigns, remise, release, and forever discharge the Government of and from all, and all manner of debts, dues, sum or sums of money, accounts, reckoning, claims, and demands, whatsoever due or to become due in law or in equity, under or by reason of or arising out of said original contract, provided, however, that the contractor herein reserves the right to file an additional claim under the Dent Act of March 2, 1919, for expenditures alleged to have been incurred in experimental work under said original contract."

9. Thereafter, a claim was filed under the Dent Act, as provided in the exception contained in Article III, and on that claim the decision was rendered, in case No. 2257.

#### DECISION.

1. The evidence taken on the original hearing under case No. 2257 disclosed clearly that Mr. Walter Soderling was paid for his time through the King Optical Co., up to the date of the issuance of the original order early in April. The time claimed for in the original case No. 2257 was for the personal services of Mr. Walter Soderling during the period between April 20, 1918, when the change was ordered to include metal reinforcement for the eyelets, and May 25, 1918, when the contractor was told to return to the original design.

2. It will be noted that Article II of the settlement contract specifically provides that the sum of \$700 therein agreed to be paid not only covers the cost of the 12 sets of molds, but also "changes and restorations for the manufacture of gas masks," and it is also further stipulated in Article II that this \$700 to be paid to the contractor "*shall constitute full and final compensation for articles or work delivered, services rendered, and expenditures incurred by the contractor under said original contract, except as herein provided.*"

3. The exception under which it is apparent that the Liquidation Division has misinterpreted the original decision also provides that the contractor may reserve the right to file an additional claim for expenditures incurred in experimental work under said *original contract*.

4. This Board is therefore of the opinion that the contractor entered into a duly executed and valid settlement contract whereby it received the sum of \$700 paid to it in full and final compensation for articles or work delivered, services rendered, and that the original decision of this Board denying relief for services rendered by Mr. Walter Soderling for changes and restorations should be sustained.

#### DISPOSITION.

1. A final order denying relief will issue.  
Mr. McCandless and Mr. Price concurring.

JUNE 30, 1920.

**Case No. 2455.**

*In re* **CLAIM OF STANDARD TEXTILE PRODUCTS CO. (REHEARING).**

This claim was originally heard by the Board on May 12, 1920. (Vol. V, page 304, these Decisions.) A decision was made at that time denying claimant relief. On a rehearing had on June 21, 1920, the former decision of the Board was adhered to. The syllabus written for the former opinion applies to the recent one. The former opinion contains a statement of facts which is not given in the last.

Maj. O'Neill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. A rehearing was granted claimant for the purpose of affording it an opportunity to present evidence which would justify an avoidance of the cancellation agreement for the award mentioned in the original opinion, on the ground that it was the mutual intention of the parties that the items claimed for should not be included in the cancellation agreement, and that the claimant should be permitted subsequently, and in spite of the settlements, to make claim for and to receive reimbursement for the items now claimed.

2. On the second hearing the claimant not only failed to produce any testimony in support of the contention above outlined, but the Government produced a witness in the person of Fred C. Wightman, who at the time the cancellation agreement was entered into was chairman of the Board of Contract Adjustment of the New York zone, which Board negotiated the settlement agreement under consideration. Mr. Wightman testified as follows:

"Major O'NEILL. You heard me read from the opinion rendered after the former hearing in this case, where it is stated: 'The claimant seeks to avoid those settlements on the ground that, at the time they were entered into, it was the mutual intention of the parties that the items now claimed for should not be included therein, and that the claimant should be permitted, subsequently and in spite of those settlements, to make claim for and to receive reimbursement for those items.' Was any such contention made at the time this adjustment was made?"

"Mr. WIGHTMAN. No, sir. It was the understanding of the members of the Board that his final claim was incorporated in the questionnaire he submitted.

"Maj. RYMAN. Your understanding about this was that it was a wiping out of the entire claim of the Standard Textile Products Company against the Government?

"Mr. WIGHTMAN. Yes. We would not have asked him to sign that except we thought that was final and he had no further claim against the Government."

DECISION.

1. The claimant has failed to produce evidence which by any possibility can be construed as showing a mutual mistake in the cancellation agreement and award that were entered into.

2. For that reason the former opinion is adhered to and relief is therefore denied.

DISPOSITION.

A final order will be entered denying the relief prayed for.  
Col. Delafield concurring.



JUNE 30, 1920.

**Cases Nos. 1486, 1908, and 2165.**

*In re* **CLAIM OF UNEXCELLED MANUFACTURING CO.**

- 1. CLAIMS UNDER COMPLETED OR SETTLED CONTRACTS.**—Where claimant seeks reimbursement of various items of cost incurred in the performance of a number of contracts all of which have either been completely performed and paid for or partially performed and settled, there can be no recovery under such contracts.
- 2. STIMULATION OF PRODUCTION.**—Where claimant had a number of Government contracts in connection with which various Government officers stimulated claimant's production without making any express agreements to reimburse claimant its expenditures thus incurred, claimant is not entitled to relief under the act of March 2, 1919.
- 3. CLAIM AND DECISION.**—These three (3) claims, aggregating \$10,928.78, were filed in part under the act of March 2, 1919, and in part under General Order 103, and arise under contracts for position lights and other pyrotechnics. Held, claimant is not entitled to recover.

Mr. Williams writing the opinion of the Board.

**FINDINGS OF FACT.**

The matters of consideration involved in these three cases are so interlaced that it is essential that they be treated and disposed of together. Case No. 1486, which we will call claim No. 1, arises under the act of March 2, 1919, class B, under Supply Circular 17, War Department, 1919, and is for \$1,126.84; case No. 1908, which we will call claim No. 2, arises under General Order 103 of the War Department, 1918, and is for \$3,801.91; case No. 2165, which we will call claim No. 3, arises under the act of March 2, 1919, class B, under Supply Circular 17, and is for \$6,000.03. Certain general facts affecting the relationship of the petitioner to the Government, should be set out and separate facts are detailed in connection with the three separate claims.

1. Beginning in the fall of 1917 and continuing throughout the war the petitioner was a manufacturer of pyrotechnics, operating manufacturing plants at Jersey City, N. J., New Brunswick, N. J., Reading, Ohio, East St. Louis, Ill., Granitville and Staten Island, N. Y. During the course of petitioner's dealings with the Government a great number of formal contracts were entered into; and in view of the fact that certain of the claims here made were linked,

for conventional or other reasons, to certain of these contracts, it is deemed essential not only that a list of these various contracts be set out, but that the manner in which they have been disposed of should also be stated. The following list shows these various contracts, and the notation "Completed" means that all the articles called for by the contract were furnished and paid for, the notation "Paid" means that the contract was either finished and paid for or a claim based upon the same has been paid, and the notation "Subject to consideration herein" means that some portions at least of the claims here presented are alleged to have arisen thereunder:

Date.	Number of contract.	Quantity and articles.	Disposition.
Dec. 1, 1917	G-1121-424 TW.....	70,000 signal rockets.....	Completed.
Dec. 8, 1917	G-1274-472 TW.....	50,000 position lights.....	Completed.
Feb. 1, 1918	P-2472-870 TW.....	2,000,000 stars for signal lights..	Subject to consideration herein. See note 1 below.
Feb. 22, 1918	P-3271-1125 TW.....	265,000 rifle lights.....	Paid.
Feb. 22, 1918	P-3272-1126 TW.....	265,000 signal lights.....	Paid.
Feb. 22, 1918	P-3273-1127 TW.....	118 signal rockets.....	Paid.
Feb. 22, 1918	P-3274-1128 TW, supplemented Aug. 3, 1918.	30,000 signal rockets.....	Paid.
Feb. 22, 1918	P-3280-1134 TW.....	485,000 position lights.....	Paid.
Mar. 5, 1918	P-3275-1129 TW.....	660,000 position lights.....	Completed.
Mar. 5, 1918	P-10875-2122 TW.....	6 rockets.....	Completed.
Sept. 27, 1918	P-15554-2549 TW.....	30,000 position lights.....	Completed.
Oct. 2, 1918	P-15792-2569 TW.....	150,000 position lights.....	Paid.
Dec. 19, 1918	P-15167-2504 TW.....	75,000 signal parachute rockets.	Completed. See note 2.

**NOTE 1.**—The contract of Feb. 1, 1918 (P-2472-870 W) for 2,000,000 stars for signal lights was supplemented by a contract dated Aug. 26, 1918 (War Ord. P-2472-870 TW), by which the parties mutually agreed to reduce the number of stars for signal lights called for under that contract from 2,000,000 to 1,223,400, and provided as follows:

"No further delivery under the above-mentioned contract, beyond delivery of the items agreed upon in Article I hereof (1,223,400) shall be required of the contractor, and no payments other than for the items so delivered shall be required of the United States. The United States is hereby released from any and all claims and demands whatsoever arising out of this partial cancellation of the contract of February 1, 1918."

This supplemental agreement, which was, in effect, a partial cancellation of the contract of Feb. 1, was brought about by the fact that at about the time of this supplemental agreement the Government had decided to make some slight changes in the measurements and method of manufacture of these pyrotechnics, and upon taking an inventory, so to speak, of the pyrotechnics then being manufactured under additional contracts sought to limit production of the character of star lights called for to those that had been made up or those that were in progress, and supplemental contracts were made with the manufacturers, including petitioner, upon that basis, full opportunity having been given petitioner to include in the supplemental agreement all manufactured or partially manufactured articles.

**NOTE 2.**—This contract seems to have been in effect, while not appearing so on its face, a settlement of a certain informal agreement which was entered into between the Government and the petitioner as reflected in a certain letter of Oct. 25, 1918, for 1,000,000 rockets. Beginning on Sept. 25, 1918, with a conference between Maj. Wilmer of the Gas Defense Service and Mr. Bingle, president of petitioner company, there was a discussion of a large proposed contract for 1,000,000 rockets which were to be manufactured by petitioner. This subject is dealt with in the letters of Oct. 11, Oct. 16, and Oct. 25, passing between the parties, which resulted in the informal contract on the 25th of October for the manufacture by the petitioner of 1,000,000 rockets, but which was never reduced to contract form. The coming on of the armistice made the manufacture of this enormous quantity of rockets inadvisable and all matters involved in the informal agreement of Oct. 25 seem to have been settled in the contract of December 19.

2. In addition to the above-mentioned contracts that were entered into between the petitioner and the Government of the United States, and under which petitioner claims he is entitled to recover certain elements of the claims presented, it is also alleged by the petitioner that there are certain other expenditures which have been incurred and for which the Government is liable, by virtue of the fact that

throughout the dealings between the petitioner and the Government, and contemporaneous with the definite contracts above mentioned, there was such an urgent demand for increased production and increased facilities in the light of stated or expected needs or demands on the part of the Government as to create a liability upon the part of the Government therefor. We have examined this phase of the matter with great care, especially in view of the very complex situation resulting from the many dealings and negotiations between the parties, and find it impossible to state that any inducements or requests made by the officers of the Government to the petitioner for increased facilities or increased output became of such a definite nature, or gave rise to circumstances of such a nature, as to create any liability whatever upon the part of the Government growing out of the Government's effort to secure increased production.

3. The claims here presented have been attached partly to certain definite contracts and partly to a curtailment of certain other contracts and partly to the general claim resulting from requests on the part of the Government for increased production and alleged requests for increased facilities. These claims were submitted to the New York District Claims Board, and after investigation they were set up and allowed and tentative awards tendered embracing the following amounts as classified under the contracts named:

(a) Under contract of March 5, 1918 (P-3275-1129 TW):

Consolidated Branch.....	\$674. 41
A. L. Due, Reading Branch.....	32. 93
East St. Louis Branch.....	419. 50
Total.....	1, 126. 84
Less salvage value.	

(b) Under contract of February 1, 1918 (P-2472-870 TW):

Consolidated Branch.....	\$1, 978. 58	\$982. 11	Less salvage—
Detwiller & Street.....	5, 127. 55	58. 00	Net... \$924. 11
		3, 287. 80	
Less salvage.....		410. 00	Net... 2, 877. 80
			3, 801. 91

(c) Under contract of October 2, 1918 (P-15792-2569):

Consolidated Branch.....	\$856. 76
Detwiller & Street.....	11, 084. 92
New Brunswick.....	363. 60
	12, 805. 28
Less sprinkler system at D. & S., \$5,633.87.....	5, 633. 87
Item withdrawn.....	6, 671. 41
Less salvage, 20% on equipment.....	671. 38
	6, 000. 03

NOTE.—These items embrace certain special facilities installed, unworked material, loss of time due to changes in specifications, etc.

## DECISION.

1. There are two general theories upon which petitioner is seeking to recover the amounts asked for in these three cases: One theory is as applied to certain of the items that were incurred under the contracts of February 1, 1918, March 5, 1918, and October 2, 1918, and that they are items properly chargeable under these contracts for which petitioner has not received reimbursement. We have sought in vain to find some ground upon which this argument might be admitted as correct, but have been unable to do so. The contract of February 1, 1918, for 2,000,000 stars for signal lights was supplemented on August 26, 1918, by an agreement which reduced the number to 1,223,400 stars, and provided explicitly that the Government of the United States should not be called upon to pay for anything except the reduced number of stars. The Government having accepted and paid for the total number of stars called for under the supplemental contract of August 26, 1918, is, by the terms of that agreement, completely absolved from further responsibility in respect to any obligation created by the contract of February 1, 1918, for 2,000,000 stars. Likewise the contract of March 5, 1918, for 660,000 position lights was carried to completion and all the position lights were manufactured, delivered, and paid for, and no additional liability can be visited upon the Government as a result of this contract which was fully completed. Likewise, the contract of October 2, 1918, for 150,000 position lights, was canceled under the cancellation clause thereof and settlement made in accordance therewith so that the Government is absolved from further responsibility under that contract.

2. The second theory upon which petitioner seeks to recover certain of the items embraced in the claims above mentioned is that they are for facilities and material secured in response to urgent requests upon the part of the Government to increase facilities and to increase production on account of large expected needs upon the part of the Government. A careful examination of the evidence fails to disclose that any dealings of this nature between the Government and the petitioner crystallized this into any obligation either expressly or impliedly to reimburse the petitioner for any expenditures of the nature claimed for beyond those for which compensation has been made in the contracts that were entered into. The claim for the installation of the sprinkler system at its Jersey City plant was withdrawn when it became apparent that this was done in pursuance of police regulations of the city in which the plant was located; and upon like grounds, of course, all claim for damages occasioned by the shutdown during this process would fall. The construction of the

fence around petitioner's plant is not shown to have been done at the direct request of any Government officer; even if it had, under the circumstances attending this case, it would seem that it was as much for the protection of petitioner's plant in the circumstances existing during the war as for the Government. We deem it unnecessary to enter upon an extended and detailed discussion of the other items all of which fall under the classifications hereinbefore mentioned and which, upon the principles announced, must fail of recovery. All obligations of the Government under the letter of October 25 seem to have been satisfied as a result of the subsequent contract of December 19 calling for a curtailed production of the pyrotechnics mentioned in the letter of October 25.

3. For the reasons above stated, all relief asked for in this case must be denied.

DISPOSITION.

An order denying relief will be issued by this Board.  
Mr. McCandless and Maj. Farr concurring.

JUNE 30, 1920.

**Case No. 2729.**

*In re* **CLAIM OF CYRUS FRENCH WICKER.**

1. **CAVEAT EMPTOR.**—Where the claimant purchased jute bags from the Government upon which there was no warranty or representation as to quality, the purchaser took the risk, and he is not entitled to reimbursement for inferior or defective sacks.
2. **CLAIM AND DECISION.**—Claim under General Order 103 for \$492.54 damages on purchase of jute sacks. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board:

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$492.54 under the following circumstances:

2. In January, 1919, the claimant, Mr. Cyrus F. Wicker, was in Costa Rica. He was desirous of obtaining sacks to contain castor beans for shipment under his contract with the United States. In July, 1918, the Gas Defense Division bought and shipped to Costa Rica about 30,000 jute sacks to be used for the shipment to this country of corozo nuts, from which were made the charcoal required for use in gas masks. The sacks had been bought at second hand in this country, or had been used before being shipped to Costa Rica. More than 25,000 of these sacks were in the customhouse or in warehouses at Port Limon, Costa Rica, in January, 1919. Some of the sacks had been sent to Punta Arenas, on the Pacific coast of Costa Rica. One bale of 250 sacks was sent to San Jose from Punta Arenas and examined by Mr. Wicker. Lieut. Otto Wilson had been sent to Costa Rica by the Gas Defense Division in August, 1918. Negotiations were had between Lieut. Wilson and Mr. Wicker which resulted in the signing by Lieut. Wilson of the following paper:

“ SAN JOSE, COSTA RICA,  
“ *February 4, 1919.*

“ Received from 1st Lieut. Otto Wilson, delivered in the customs house at Port Limon, Costa Rica, three thousand (3,000) jute bags, marked ‘U. S. A. property G. D. S.,’ valued at twenty-two and one-half cents (\$.22½) each, or six hundred seventy-five dollars (\$675)



in all, which sacks—if approved by Captain Macomber, Chemical Warfare Service, U. S. A.—I agree to return to the United States and deliver at my expense to any officer of the Chemical Warfare Service authorized to receive the same on or before July 31st, 1919, or to pay to the Chemical Warfare Service, U. S. A., twenty-two and one-half cents (\$.22 1/2) for each of the three thousand bags not so returned and accepted.

“In case the return of these bags at my expense to the Chemical Warfare Service before the date mentioned shall not be approved by Captain Macomber or other officer of the Chemical Warfare Service, U. S. A., I have to-day given Lieut. Wilson thirty-day draft No. 210 on New York (Columbia Trust Company) to the order of the Chemical Warfare Service for \$675 in full payment for the above three thousand sacks. In the event of nonapproval this draft shall be presented and when paid the said three thousand sacks shall become my property and be at my free disposal; otherwise the arrangement for the return of the sacks to the Chemical Warfare Service at my expense shall be considered approved and the draft shall be canceled and returned to me or, if desired, retained as security for the return of the sacks within the time promised.

“Lieut. OTTO WILSON.”

3. Lieut. Wilson came back to this country in February, 1919, with Mr. Wicker's check for \$675. After conference with his superiors in this country a cable was sent to Mr. Wicker reading: “Check cashed.” This meant that the sale of 3,000 sacks to Mr. Wicker was approved and not the alternative proposal that the sacks should be filled with castor beans and shipped to the United States and delivered to the Government at Mr. Wicker's expense.

4. The basis for the claim is that the sacks sold to Mr. Wicker are alleged to be unsuitable for the purpose of holding castor beans during their shipment from Costa Rica to this country. Mr. Wicker testified that the sacks had deteriorated while being stored in the excessively moist climate at Port Limon from July, 1918, to February, 1919; that many of the sacks had large holes in them; and that many gave way during the voyage to the United States and spilled the castor beans. Of the 3,000 sacks sold to Mr. Wicker, he in turn sold in Costa Rica 2,000 sacks, for which he makes no claim. As to the balance, Mr. Wicker testified that they were in such poor condition as to be without value. He asks for reimbursement for the price which he paid the Government for 1,000 sacks.

#### DECISION.

1. The claimant has failed to establish that there was any express or implied warranty of fitness in the sale of the 3,000 sacks. He did not appreciate, as he says, the injurious effect on jute sacks that would be caused by storage in the saturated air of Port Limon. Lieut. Wilson made no representation as to the quality of the sacks



or as to their fitness for use in transporting castor beans. On the contrary, he urged Mr. Wicker to make an examination of the sacks before committing himself to their purchase. Mr. Wicker relied on his own inspection of the 250 sacks which had been sent from Punta Arenas. He was willing to take his chances that the sacks at Port Limon could be used by him. There was no breach of contract on the part of the United States. There was no warranty that the sacks would endure the strain of containing castor beans during shipment from Costa Rica to this country. The claimant is not entitled to any reimbursement.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for appropriate action.

Mr. McCandless and Mr. Tanner concurring.

JUNE 30, 1920.

Case No. 2617.

*In re* CLAIM OF WISCONSIN ZINC CO.

1. **WRITTEN CONTRACT—MERGER.**—A written contract is presumed to contain the entire agreement between the contracting parties, and all preliminary negotiations and agreements are considered as merged therein.
2. **RELEASE—CANCELLATION AGREEMENT.**—Where claimant entered into a cancellation agreement of a formal contract which contained a general release of the Government of all claims arising under the canceled contract, this constitutes a complete release of the Government on all claims arising from or founded on preliminary negotiations which were merged in the formal written contract.
3. **RE-FORMATION—MUTUAL MISTAKE OF LAW.**—Where a claimant signs a release of a written agreement under the mistaken notion, shared in by the representative of the Government, that it retains its rights under a prior oral agreement which was as a matter of law merged by the writing, there can be no re-formation of the instrument containing the release on the ground of a mutual mistake of law.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,764.95 expenses in manufacturing sulphuric acid. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. In the spring of 1918 the United States was in need of sulphuric acid, and on April 7, 1918, Mr. A. E. Wells and other officials of the Ordnance Department had a conference with a representative of the claimant company at Washington. At this conference it was decided that the claimant company should erect a plant and manufacture sulphuric acid from the fumes emitted in the roasting of zinc ores. As it was desired to get a greater quantity of sulphuric acid than could be had from the fumes under normal production, it was decided that the claimant company should mine and use a lower grade ore of greater sulphur content. At this conference of April 7 it was agreed that claimant company was to prepare immediately for the manufacture of sulphuric acid and that a formal contract would be prepared in due course. A formal contract was executed under date of June 28, 1918.

2. After the signing of the armistice this contract was suspended and claimant company presented a claim to the Ordnance Claims Board for the Chicago district. This board allows certain items

of expense which had been incurred subsequent to April 1, 1918. The Claims Board, Ordnance Department, Washington, D. C., approved the findings of the district board except that no allowance was made for expenses incurred prior to May 15, 1918. On February 18, 1920, the Claims Board, Ordnance Department, Washington, D. C., wrote claimant as follows:

"1. This will advise you that your claim under the above contract has been approved by the Ordnance Claims Board in the sum of \$37,722.40, less \$30,889.48, which has been paid you, leaving due you a balance of \$6,882.92.

"2. It will be noted that this is a reduction of \$3,144.15, which represents prospective engineering and assaying expenses incurred by your company prior to the date of contract, May 15, 1919.

"3. If you desire to make the claim for this item of expense, it is suggested that this item be filed at the Chicago district office as a class "B" claim under the Dent Act of March 2, 1919. There are inclosed revised settlement contract covering this award of this Board, which should be executed on the part of your company and returned to this office, where they will be approved and forwarded to the district office for payment."

Claimant company entered into a supplemental agreement under date of February 24, 1920, in which it released the United States from any and all claims and demands of every nature whatsoever arising or which may arise out of said contract of June 28, 1918.

#### DECISION.

1. The Ordnance Claims Board allowed all expenditures incurred subsequent to May 15, 1918, which appears to be the date of a written procurement request. The issue is as to the allowance of expenditures made after the date of the so-called oral agreement of April 7, 1918, and before May 15, 1918.

2. A written contract entered into after preliminary negotiations takes the place of all oral and informal agreements and understandings.

3. As soon as the written contract is executed in which the obligations of the parties are stated, any informal agreement that had previously existed disappears and can not be resurrected. This case is the common one of which the instances are so many that it is the rule rather than the exception where it is found that an agreement is orally negotiated and its terms settled and performance begun by the contractor pending the preparation of a formal contract in the usual course. Delays in drafting contracts invariably and inevitably occurred during 1918.

4. In this instance performance by the contractor was required immediately after April 7, 1918, although the formal contract is

dated June 28, 1918. The expenditures in respect of which the claimant was denied reimbursement were all incurred in performing or preparing to perform the contract that had been promised and was later executed. In such cases there do not exist two agreements on both of which relief may be based. There is but one agreement and that is the formal contract of June 28, 1918. The advice of the Ordnance Claims Board to file a claim under the act of March 2, 1919, was not sound. We do not doubt that it was given in good faith. The claimant relied on it and executed the supplemental agreement of February 24, 1920, in which it released the United States from all claims and demands arising out of the contract of June 28, 1918. So long as this release stands, it is an effectual bar to any further relief. If it were not for that release, it would be held that expenditures made by the claimant in performing or preparing to perform the contract which was later executed should be included in the reimbursement to which the claimant is entitled.

5. There was no mistake of fact common to both parties. There did exist an erroneous conception of the law of contracts which was shared both by the Ordnance Claims Board and by the claimant company. It was on account of this mistake of law that the execution of the release was asked for and given. If relief is to be given in cases where releases are obtained by reason of a mutual mistake of law, this claim presents a situation in which the claimant is entitled to reimbursement.

#### DISPOSITION.

A final order will be entered denying claimant relief.

Mr. McCandless and Mr. Tanner concurring.

JUNE 3, 1920.

**Case No. 2368.**

***In re* CLAIM OF LITTAUER BROTHERS, ON APPEAL BEFORE THE SECRETARY OF WAR.**

1. **CLAIM AND DECISION.**—This claim was disposed of by the Board of Contract Adjustment on the 3d day of April, 1920 (Vol. IV, these Decisions, page 862), by which it was held that claimant was entitled to recovery in part. Claimant appealed to the Secretary of War, who, upon the 3d day of June, 1920, affirmed the decision of this Board.

This claim comes to me on appeal from a decision of the Board of Contract Adjustment denying claimant relief.

Upon consideration of the record presented, and on the recommendation of the Special Advisers, the accompanying decision of the Board of Contract Adjustment is hereby approved and affirmed.

BENEDICT CROWELL,  
*The Assistant Secretary of War, Director of Munitions.*

**MEMORANDUM FOR THE SECRETARY OF WAR.**

After a careful examination of the record, we recommend that the action of the Board of Contract Adjustment in this matter be approved.

R. C. GOODALE,  
G. H. DORR,  
*Special Advisers.*

JUNE 4, 1920.

**Case No. 2136.**

*In re* **CLAIM OF THE THEODORE TIEDEMANN CORPORATION.**

1. **IN ANTICIPATION OF FUTURE CONTRACTS—RESERVE SPACE.**—Where claimant, at the suggestion of the Government, offered to devote the entire energies of its factory to Government work, and was later awarded a formal contract to sponge, shrink and dye cloth, which contract was not sufficient to require claimant's entire space which it had provided for Government work, the Government is not obligated under the act of March 2, 1919, to reimburse the claimant for loss sustained in providing for the additional space in the absence of evidence showing that the Government agreed to pay such expense.
2. **CLAIM AND DECISION.**—This claim for \$4,000 arises under the act of March 2, 1919, and is presented upon the theory that the Government failed to perform an informal agreement to give claimant work to the full extent of its capacity. Held, claimant not entitled to the relief sought.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

This Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$4,000 by reason of agreements alleged to have been entered into between the claimant and the United States.

2. The claimant is a corporation doing business in New York City. It had done much work for the Government during 1917 and 1918 in the sponging and shrinking of Government cloth. There were about 35 concerns in New York City engaged in the same work for the Government.

On August 24, 1918, the claimant received a questionnaire which it was requested to prepare and return to the Clothing and Equipage Division, New York City. This was done and the answers showed the capacity and equipment which the claimant had for sponging, shrinking, and drying.

3. The Government decided in October, 1918, to have its sponging and shrinking done by about 12 concerns who would agree to devote their entire capacity to Government work. There were many ad-

vantages to the United States in making such an arrangement. A meeting was called of representatives of the sponging concerns by Col. Mercer, Chief of the Clothing and Equipage Division, in October and the plans of the Government were announced and requests made for volunteers who would be willing to confine themselves wholly to Government work. The claimant was one of those selected because of its satisfactory performance of previous contracts. It wrote the following letter to the Clothing and Equipage Division on October 24, 1918:

Attention: Lieut. H. W. Chase.

Re: Plant operation.

DEAR SIR: Agreeable with our telephone message, we are pleased to advise you that on issuance of the new contract our plant is willing to confine itself to 100% Government work exclusively.

Very respectfully, yours,

THE THEODORE TIEDEMANN CORPORATION,  
*Treasurer.*

HFT/EP

This was answered by Lieut. H. W. Chase of the Clothing and Equipage Division, as follows, on October 25:

WAR DEPARTMENT,  
MATERIAL CONTROL OFFICE, QUARTERMASTER CORPS,  
*New York City, October 25, 1918.*

From: Depot Quartermaster, C. & E. Division, 101 West 21st Street,  
New York City.

To: Theo. Tiedemann Corp., 40 West 25th Street, New York City.

Subject: Contracts for sponging and shrinking.

1. You are hereby notified that your offer of your plant at 40 West 25th Street at 100% for the sponging and shrinking of woolen, cotton, and canvas materials for the Government, has been accepted and contract will be awarded you for the performance on these materials, effective November 1st, 1918, in accordance with specifications and prices set forth in the contract.

2. It is requested that proper arrangements be made to turn over your entire space for Government work, effective November 1st.

3. Kindly acknowledge receipt of this letter.

By authority of the Depot Quartermaster.

CLOTHING & EQUIPAGE DIVISION,  
*Manufacturing Branch, Shrinking Section.*  
H. W. CHASE,  
*1st Lieut. Quartermaster Corps.*

HWC/IG

4. On October 29, 1918, Lieut. Chase wrote the claimant that it was the "intent of this office to operate a less number of plants to a greater and more even capacity than heretofore."

"4. I know that it is not your desire to operate a proportion of your capacity, and I feel confident that you will put every effort into



gaining a certain production each day from your plant, in order to make this step taken by this office a success.

"5. This office will expect as an even daily production from your plant: 400 pcs. of steam work, viz, 200 pieces for steam process, and 200 pieces for all water work."

5. On October 30, 1918, the claimant wrote the Clothing and Equipage Division that it could guarantee an even daily production of "400 pieces of 6/4 steamed and sponged goods."

"On the water shrinking, however, on account of our increased facilities, we are able to guarantee a minimum of 250 pieces of 6/4 goods averaging 60 yards to the piece, or 500 pieces of 3/4 goods. If, however, you are unable to give us more than 200 pieces daily, we could reduce our capacity by giving up our present premises on the 12th floor where we are doing air drying, as the drier we have installed can take care of 200 pieces of 6/4 goods mentioned in your letter.

"We trust that you will be able to keep us fully supplied on the water shrinking."

6. A day or two after the letter of October 30, 1918, Henry F. Tiedemann, treasurer of the claimant corporation, had a conversation with Lieut. Chase in which he said that, if the Government could not keep the claimant supplied to its full capacity, the claimant could sublet its leased loft on the twelfth floor advantageously. Lieut. Chase told Mr. Tiedemann that under no circumstances should the claimant reduce its full capacity.

7. The affidavit of Lieut. Chase confirms Mr. Tiedemann's testimony. It reads:

"The deponent further states that he recalls the conversation with Mr. Henry Tiedemann, in which he (Mr. Tiedemann) questioned the deponent as to the possibility of obtaining a greater required production for his plant and intimated that unless the daily production expected by the Government from his plant could be increased, he thought it was wise to sublease space, other than that which was required to gain the above specified daily production."

"Deponent further recalls that he verbally instructed Mr. Tiedemann at that time, that under no circumstances was he to reduce the capacity of his plant as outlined in the deponent's letter of October 29th, 1918."

8. A formal contract numbered 9028 was prepared under the direction of Maj. John R. Holt, contracting officer, Quartermaster Corps, dated November 1, 1918, which was sent to the claimant for signature. It was executed by the claimant shortly before or shortly after November 11, 1918, and received the final approval of the Government on December 3, 1918.

The contract provides that it may be terminated by the United States by 15 days' notice in writing. It also contains provisions as to the prices which will be paid for the services to be rendered. It

does not obligate the United States to give the claimant any fixed amount of work or to deliver to the claimant for sponging or shrinking any material whatever.

9. The claimant finished sponging, shrinking, and drying the Government materials it had on hand at the time of the signing of the armistice, and thereafter no cloth was sent to it by the United States.

10. A supplementary contract was prepared by Maj. Holt, dated December 20, 1918, which contained a clause releasing the United States from all obligation under Contract No. 9028. This was sent to the claimant for execution but has not been signed.

11. The claimant was able to sublet its leased loft on May 1, 1919. Its claim is for the rent of the loft for six months from November 1, 1918, to May 1, 1919, amounting to \$3,125 plus a loss of \$875 caused by its sublease being for a reduced amount, a total of \$4,000.

#### DECISION.

1. There was no oral agreement entered into between the claimant and the United States which dealt with other matters than those covered by the formal contract. The letters which were exchanged on October 24 and October 25, 1918, demonstrated beyond doubt that the claimant expected to devote its plant entirely to Government work, and that the Government intended to make use to its full extent of the capacity of the claimant's plant.

The evidence does not show, however, that the Government intended to enter into a contract by which it should become bound to deliver enough material to the claimant to enable it to utilize its facilities to their capacity. On the contrary, the contract which was prepared makes no provision by which the United States undertakes to supply the claimant with cloth for shrinking and sponging, but does provide for a 15-day notice of termination.

The claimant executed this contract without objection. It was later executed in behalf of the United States. The claimant must stand or fall on the terms of the written contract.

2. It is true that the claimant gave up its private business so as to be able to turn its facilities over to the Government, and it did so at the request of officers of the United States, but it acted in the expectation of being awarded a contract. That expectation was realized and a contract that must be held to be satisfactory was duly executed by both parties.

The statement by Lieut. Chase that the claimant should not diminish its capacity by subletting a loft can not be taken to enlarge or modify the written contract, nor can it be held to be a separate agreement. The claimant had previously assured the Clothing and

Equipage Division that it would use all its facilities for Government work. It was not for Lieut. Chase to relieve the claimant from the consequences of having given such assurance. An important condition imposed on the claimant and others before a new contract would be entered into was that it should use its "entire space for Government work."

3. Although no relief can be given the claimant on the basis of an informal agreement, it is possible that an adjustment should be made of the formal contract No. 9028. The evidence shows that performance under this contract was suspended shortly after the armistice. The proposed supplementary agreement, dated December 20, 1918, recites:

"Whereas in consequence of suspension of hostilities with Germany, it appears that further services under said contract are not required."

This may be regarded as a notice of suspension of the contract. It is not a fifteen-day notice of termination following the provision of the contract.

It is a contract for services and not for supplies, but if the claimant has incurred losses in performing or preparing to perform the contract, reimbursement may be given. No determination of this issue appears to have been made. In reaching a conclusion, the Board to which this claim is sent should have in mind not only that the United States did not agree in terms to give the claimant any work and that the contract contains the fifteen-day termination clause, but also in fairness to the claimant that it was required to withdraw from all its civilian business as a condition to receiving a contract.

#### DISPOSITION.

The claim is transmitted to the Claims Board, Director of Purchase, for appropriate action in accordance with this decision.

Col. Delafield concurring.

JUNE 4, 1920.

**Case No. 2526.**

*In re* **CLAIM OF VELIE MOTORS CORPORATION.**

**1. DELAYS—LIQUIDATION DAMAGES—CONSTRUCTION OF CONTRACT.—**

Where a contract provided for liquidated damages for delay in deliveries, but contained a clause that the contractor shall not be responsible for, and no deductions shall be made for, any delays caused by direct act or failure of the United States without fault of the contractor; delays caused by changes in the specifications, or materials, can not be charged against the contractor.

**2. DELIVERIES—EXTENSION OF TIME.—**Where the contract provided that the time for delivery might be extended by the contracting officer when delays were caused by the United States, or by other cause beyond the control and without fault of the contractor, an extension is proper for the causes mentioned in paragraph 1 hereof and no liquidation damages should be charged against claimant because thereof.

**3. CLAIM AND DECISION.—**Claim under G. O. 103 on formal contract for \$7,577.04 liquidated damages; held, claimant entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, on a claim for \$7,577.04 on a formally executed contract.

2. The Velie Motors Corporation of Moline, Ill., entered into a formally executed contract with the Ordnance Department, U. S. A., No. C-M-G-74, dated October 25, 1917, for the manufacture of 10,000 machine-gun carts.

Article II of this contract contains the following clause:

“The contractor shall not be responsible for any delays which shall be determined by the contracting officer to have been caused by direct act or failure of the United States without fault of the contractor.”

The contract also provides:

“Delivery of material herein contracted for shall commence on or before December 26, 1917, and shall be made as follows:

1,300 carts on or before January 26, 1918.

8,700 additional carts on or before May 9, 1918.

It is understood and agreed that the deliveries of the different types of carts shall be made in the following ratio:

600 gun,  
600 ammunition, and  
100 spare gun carts.”

Article III, clause 4 of the contract, provides as follows:

"In the event that the contractor shall fail to deliver the articles according to the schedule of deliveries provided herein for deliveries of complete articles, sets, or lots, as the case may be, the contractor shall be in default under this contract, which default shall continue until such time as such articles, sets, or lots shall be delivered. When one or more parts of an article, or articles of a set or lot, are not delivered by the proper date, the complete article, or the entire set or lot, as the case may be, shall be classed and considered as undelivered for the purpose of computing liquidated damages. For each day during which the contractor shall be in default on account of such deliveries, the United States shall deduct from any payment to be made to the contractor thereafter one-thirtieth ( $1/30$ th) of one (1) per cent of the purchase price, before making any adjustment, of each article, or set or lot of articles, with respect to which the contractor shall be in default, and the United States shall also deduct from any payment to be made to the contractor thereafter such additional cost of inspection and superintendence, if any, as may be caused by any default of the contractor:" \* \* \*

\* \* \* *"Provided, however, That the contracting officer may extend the time for delivery of any articles for a period equal to any delay or delays caused in his opinion by any act of the United States or by any act of war, riot, incendiarism, and the like, or by strike, fire, storm, and the like, or by other cause beyond the control and without the fault of the contractor occurring during such time as the contractor may not be in default or before the expiration of any previous extension of the time for delivery of any articles, and no deduction shall be made for delay arising out of any such cause."*

3. The carts were completed and delivered as follows:

	Amm.	Gun.	Spare.	Total.
<b>1918.</b>				
Feb. 19 to 28.....	301	252	.....	553
Mar. 1 to 30.....	671	756	78	1,505
Apr. 1 to 30.....	1,335	1,369	150	2,854
May 1 to 31.....	969	1,128	149	2,246
June 3 to 29.....	671	784	117	1,572
July 1 to 9.....	245	153	102	500
July 9 to 22.....	418	168	184	770
	4,610	4,610	780	10,000

4. The evidence shows that under the terms of the contract 1,300 carts were to have been delivered by January 26, 1918, but that on January 24, two days before the contractor was required to make the first deliveries, the final design for the carts and the various parts thereof had not been adopted.

5. Lieut. John S. Peoples, Ordnance Department, who designed the carts and had charge of the preliminary work connected with the proposed manufacture and who visited the plant many times during the earlier stage of the work, testified at the hearing as follows:

"The equipment to be carried on these carts was not all designed, and, in fact, the completed list of the equipment was not even made up, so when I designed the carts and drew up the specifications I

had to use my imagination as to what would be carried on the carts, and designed the carts to carry that load before we knew what the load was. The result was that it became necessary later to make several minor changes in the carts in order to accommodate the cart to the load."

6. First Lieut. Samuel P. Riggins, inspector of ordnance at the plant, testified:

"There was a great amount of really almost conflicting ideas on this situation when it started at first, to start the thing out. There were a great many changes from the French gun to the American type of gun cart, due probably to our different style of machine gun, and we arranged ours so that it would carry the three different designs of guns, namely, the Lewis, the Browning, and the Vickers.

"The contractors worked with me hand in hand. We found that some of the pieces did not match up; that is, the blue prints did not assemble properly. We had to change them so that the guns would enter into the boxes and we had quite considerable difficulty with the arrangement of the interior of that machine-gun box, trying to get it so arranged that it would carry all three different styles of gun. These changes made by the Government absolutely entailed delay. We held up the factory time and time again. We would have, say, five hundred pieces, or a dozen pieces of one kind coming through, and I would have to change it all. They followed our instructions, which forced delay. I was familiar with the condition there. They had been held up so much. They did everything possible to get their work out and they went ahead."

7. Lieut. Waldemar H. Jacob, Ordnance Department inspector at the plant, testified:

"That the contractor was in no way negligent; that he did everything that he could; that a delay of some 14 days in the latter part of the work was occasioned by his (the inspector) not being willing to undertake the responsibility of accepting some 600 wheels; that while the wheels were perfectly satisfactory and would withstand any shock to which they might be subjected, yet there had been such a shrinkage in the size of the felloe, such a variation from the specifications, that he did not care to assume the responsibility of passing them without having them approved by the Engineering Department."

8. The evidence also shows that the defects in the 600 wheels in question arose from hickory being almost unobtainable and oak had to be substituted, which substitution was made with the approval of the Government. However, the manufacturers were not familiar with the treatment required for oak for this purpose and in drying out it would often dry out undersize. The wheels were accepted later by the Government after samples had been sent to Washington.

9. The evidence shows that on April 8, 1919, the contractor applied in writing for an extension of eighty-four (84) days on account of the delays caused by the changes in specifications and designs and was granted an extension of sixty (60) days, which extended the time



of delivery of the entire lot from May 9 to July 9, 1918, but this extension only operated on the last portion of the contract and no extension was given on the time for delivery of the first 1,300, although the causes for requesting the extension all occurred during and immediately subsequent to the time the first 1,300 should have been delivered. This extension was made in the form of an amendment to the contract, but the amendment was proxy-signed and later at the request of the department the amendment was canceled and in the amendment carrying such cancellation the following clause was inserted:

“Such cancellation being in the interest of the United States and being without prejudice to the right, if any, in the contractor to such extension of time for the making of deliveries in the manner provided for in the contract, dated October 25th, 1917.”

10. The effect, therefore, of this second supplemental amendment was simply to restore both parties to the position which they occupied prior to the entrance into the first supplemental amendment and since that time the case has been before the Ordnance Department for a decision as to whether an extension of time should be granted, and the Ordnance Department Claims Board forwarded the claim to the Board of Contract Adjustment for determination.

#### DECISION.

1. Under the terms of the contract the contractor is to be allowed extension to cover such delays as are not occasioned through the default of the contractor.

2. The contracting officer not having all the facts before him was unwilling to allow a greater extension than sixty (60) days. The Ordnance Claims Board, acting for the Chief of Ordnance and having no more facts before them than were before the contracting officer, also disallowed an extension beyond sixty (60) days.

3. It is clear from all the evidence that the delays were not the fault of the contractor; that the changes in specifications and designs during the first four months of the contract rendered it impossible for the contractor to have made deliveries as specified.

4. It is, therefore, the opinion of this Board that the contractor should not be penalized by assessing liquidated damages and that such extension of time should be granted as will enable the disbursing officer to pay the contractor the amount withheld.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Ordnance Department, for action in accordance therewith.

Col. Delafield and Mr. Averill concurring.



JUNE 26, 1920.

**Case No. 2493.**

*In re* **CLAIM OF PENNSYLVANIA RAILROAD CO.**

1. **PART OF SIDING ON RAILROAD RIGHT OF WAY.**—Where the Government contracted with claimant for construction of sidings on Government property, with the understanding that claimant would stand the cost of that part of the siding on claimant's right of way, and later claimant found it necessary to relocate that part of the siding at considerable expense, there is no implied agreement obligating the Government to reimburse claimant its costs so incurred.
2. **JURISDICTION.**—This Board has no jurisdiction of a claim under a validly executed and fully performed contract.
3. **CONSIDERATION.**—A formal contract executed after the work has already been done under an informal agreement is not binding on the parties.
4. **CLAIM AND DECISION.**—Claim for \$140,995.97 filed under the act of March 2, 1919, but considered as arising in part under G. O. 103, based upon contracts, formal and informal, for the construction of railroad sidings at Edgewood, Md. Held, claimant is entitled to recover in part.

Mr. McCandless writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. The claim is made under two agreements, one under G. O. 103, and the other under the act of March 2, 1919. A statement of claim, Form A, dated June 19, 1919, was filed with the Claims Board, Transportation Service, which sent the claim to the Claims Board, Ordnance Department, and that Board forwarded the claim to the Board of Contract Adjustment on or about February 26, 1920.

2. The claimant, during the years 1917 and 1918, was lessee of the Philadelphia, Baltimore & Washington Railroad Co. It alleges in its statement of claim that on or about November 3, 1917, it entered into an agreement for the construction of a private siding on Government property from a point on the easterly right-of-way line of the Maryland Division, by 4,105 feet south of the center of Edgewood passenger station, Maryland, to a point designated by the officer in charge, said siding being 6,313 feet in length; also the construction of a spur track from said siding 2,880 feet in length, the claimant to assume the cost of construction within its right-of-way line,

and the applicant to assume the cost of construction beyond the claimant's right-of-way line.

3. In the statement of claim the claimant sets forth the items of its claim as follows:

**EXPENDITURES.**

Railroad company's portion-----	\$45, 445. 00
Material-----	22, 912. 35
Labor and material for portion off railroad company's property----	72, 638. 62
<hr/>	
Total-----	140, 995. 97

At the hearing, May 22, 1920, Mr. R. A. Whittingham, engineer for the claimant, testified that the claimant had expended the said sums for the said tracks as set forth, with the exception of the sum of \$349.73, which was a 10 per cent overcharge in the first bill rendered by claimant.

4. On October 12, 1917, J. C. Auten, engineer of the claimant, wrote Capt. E. J. W. Ragsdale as follows:

"Referring to conference I had with Capt. Chance at Edgewood to-day, in connection with proposed siding to the gas plant, at which time the following arrangement was made:

"That the railroad company would make the surveys immediately, employ a contractor and do the grading, furnish all the track material, and do the track laying; in fact, do all the work and have the siding in service within two weeks, this with the understanding that the Government will reimburse the railroad company for all labor costs on the reservation property, and that the Government will replace the material furnished by the railroad company for use on Government property.

"In order that our records in this matter may be kept in usual order, will you kindly arrange to have forwarded to Mr. G. Latrobe, general superintendent P. B. & W. R. R. Co., Wilmington, Del., the usual order from the proper commanding officer covering this transaction?

"We expect to begin the construction work on this siding on Monday the 15th inst."

5. On November 16, Capt. E. J. W. Ragsdale wrote Mr. G. Latrobe, general superintendent of the Philadelphia, Baltimore & Washington Railroad Co., as follows:

"Subject: Railroad siding. .

"1. Referring to your letter of October 12, 1917 (GTW 412.34/238), and telegram of to-day, relative to the proposed siding to the filling plant at Edgewood, Md., I am directed by the Chief of Ordnance to inform you that the terms therein outlined in your letter of October 12th are acceptable to the Government, and you are authorized to proceed with the work pending the receipt of a formal purchase order, which is now under way."

6. A proxy signed procurement order G811-348 TW, dated November 3, 1917, was sent to G. Latrobe, general superintendent of the

claimant, and was signed and accepted by G. Latrobe on November 20, 1917. The said procurement order reads as follows:

"1. Under the provisions of section 120 of the act of Congress relating to national defense, approved June 3, 1916, an extract copy of which is enclosed, and other laws of the United States and the Executive orders of the President of the United States, or heads of its departments, under which the requirements of advertisement for proposals are dispensed with, and letter from your Mr. J. C. Auten, principal assistant engineer, to Capt. E. J. W. Ragsdale, dated October 12, 1917, and also letter from Mr. J. C. Auten to Capt. Edwin M. Chance, dated October 17, 1917 (GTW 412.34/256), which have reference to the order, I am directed by the Chief of Ordnance to herewith give you an order for one (1) switch and siding to be constructed at Edgewood, Md.

"2. The inspection of the material and work is to be conducted by the Trench Warfare Branch, Design Section, Gun Division, 7th and B Streets, Washington, D. C.

"3. The switch and siding are to be erected at Edgewood, Md., beginning October 15, 1917, and are to be completed within two weeks from that date.

"4. The price to be paid you in connection with this order will be on a basis of cost as determined in accordance with the "Definition of cost pertaining to contracts" issued by the Finance Division, Ordnance Department, under date of June 27, 1917, a copy of which is enclosed, plus a fee of ten per cent (10%) to include engineering, incidentals, and profit. The following is an estimate of cost, including the fee of 10% :

Clearance and grubbing-----	\$330. 00
Grading-----	5, 346. 00
Track-----	21, 292. 00
Cast-iron pipe-----	356. 00
	<hr/>
	27, 324. 00

"5. As delivery of the material and the completion of the work are to be accomplished within 60 days from the date of this order, no formal contract will be required. This letter with your acceptance endorsed on the enclosed copy will constitute the contract for this order.

"6. The material and work covered by the foregoing order should be charged to the Chief of Ordnance, U. S. Army. You are requested to forward to this office triplicate copies of invoices.

"7. Any communication in connection with this procurement order should make reference to G. P. W. O. 420-618G; War-Ord-G811-348TW; GPT. You are requested to notify this office of your acceptance of the above order by wire as well as by the inclosed copy.

" Respectfully,

" JAY E. HOFFER,  
" Colonel, Ordnance Dept., U. S. A.

" By C. H. COOK,  
" Major, Ordnance Dept., U. S. A.

"PURCHASE SECTION, GUN DIVISION,  
 " *Ordnance Office, War Department,*  
 " *621 G Street, Washington, D. C.*

"You are advised that this company hereby accepts this order as per above letter.

"G. LATROBE,  
 " *General Superintendent.*

"(Date) Nov. 20, 1917.

"(To be signed and returned to Purchase Section, Gun Division.)"

7. On October 29, Capt. E. J. W. Ragsdale wrote the said J. C. Auten regarding a further siding, as follows:

"Subject: Railroad siding.

"1. The Chief of Ordnance has directed me to advise you that we desire to install a switch and continuous siding, as indicated in the enclosed blue print.

"2. It is desired that this work be initiated immediately upon the completion of the present switch and siding.

"3. I would be glad to receive a formal proposal from you, giving an estimate of the cost of this work in order that a purchase order may be issued to you for it."

8. On November 15 the said J. C. Auten replied to the above letter as follows:

"Referring to my letter of the 12th inst., relative to the location and construction of additional siding into the proving grounds south of Edgewood, Md., in accordance with blue prints enclosed with your letter under date of Oct. 29th, GTW, 453/5. I would advise that we estimate the probable cost of this siding in the location and of the length as shown on the blue prints, to be \$12,632, divided as follows, viz:

" Grading-----	\$1, 540
" Track-----	10, 584
" Cast-iron pipe culverts-----	508
" Total-----	12, 632

"The above includes 10% for engineering and incidentals.

"In accordance with the second paragraph of your letter, the grading for this siding was started promptly and is now about completed. The track work will follow as fast as the material is delivered on the ground. This, of course, is with the understanding, as stated in our letter of October 12th, relative to the main siding, that the Government will reimburse the railroad company for all labor costs entailed in the construction of this proposed branch siding, and will replace the material furnished by the railroad company.

"Will you kindly arrange to have forwarded to Mr. G. Latrobe, genl. supt., P. B. & W. R. R. Co., Wilmington, Del., the purchase order referred to in the third paragraph of your letter, so that we may have proper record of the transaction. Advise promptly."

9. Procurement Order G1212-457TW, dated December 11, 1917, was sent to G. Latrobe and was accepted by G. Latrobe in writing on December 26, 1917. The said procurement order reads as follows:

"1. Under the provisions of section 120 of the act of Congress relating to national defense, approved June 3, 1916, an extract copy of which is enclosed, and other laws of the United States and the Executive orders of the President of the United States, or heads of its departments under which the requirements of advertisement for proposals are dispensed with, I am directed by the Chief of Ordnance to hereby give you an order for siding consisting of grading, track, and cast-iron pipe culvert, running into the U. S. Proving Grounds, Edgewood, Md.

"2. This grading is to be done in accordance with the blue prints already in the hands of the R. R. company's agents.

"3. Inspection of this work will be conducted by the Trench Warfare Branch, Design Section, Gun Division, 1800 Virginia Avenue, Washington, D. C.

"4. You will be paid the actual cost of this work determined in accordance with the "Definition of Cost Pertaining to Contract" issued by the Finance Division, Ordnance Department, under date of June 27, 1917, plus a profit of ten per cent (10%). A copy of this order is enclosed herewith.

"5. As this work has been completed, no formal contract will be required. This letter with your acceptance endorsed on the enclosed copy will constitute the contract.

"6. The material covered by the foregoing order should be charged to the Chief of Ordnance, United States Army.

"7. Any communication in connection with this procurement order should make reference to GPWO 793-908G; War-Ord-G1212-457Tw; GPM. You are requested to notify this office of your acceptance of this order by wire as well as by your endorsement of the enclosed copy.

"Respectfully,

"JAY E. HOFFER,  
"Colonel, Ord. Dept., U. S. Army,  
"By C. H. COOK,  
"Major, Ord. Dept., U. S. R.

"PURCHASE SECTION, GUN DIVISION,  
"Ordnance Office, War Department,  
"1800 Virginia Ave., Washington, D. C.

"You are advised that this company hereby accepts this order as per above letter.

"(Date) December 26th, 1917.

G. LATROBE,  
"General Superintendent.

"(To be signed and returned to Purchase Section, Gun Division.)"

10. The procurement order dated November 3d, 1917, contains the following:

"Plus a fee of ten per cent to include engineering, incidentals, and profits."

The procurement order of December 11 contains the following provision:

"Plus a profit of ten per cent."

At the hearing the attorney for the claimant admitted that the said 10 per cent provisions were inserted in the procurement orders by mistake, as the agreement of the parties was that the claimant should build the said siding, and also the said spur, for the Government at cost, as set forth in the letter of J. C. Auten to Capt. Ragsdale, dated October 12, 1917.

11. The claimant introduced the testimony of its construction engineer, Richard A. Whittingham, to the effect that the claimant constructed the siding and spur on the Government land, beginning at a point on the main line of the claimant's railroad 4,105 feet south of the center of Edgewood passenger station, and that the said siding was connected up to the main line of the railroad at that point, and operated at that point until some time in February, 1918. He testified that connection with the main line of the railroad at that point was uneconomical and dangerous and that the railroad thereafter built an additional switch along its right of way 2,582 feet toward the Edgewood passenger station to a new clearance point.

12. Capt. E. M. Chance, the Government officer in charge of said construction, testified that on October 12, 1917, he conferred with J. C. Auten, the claimant's engineer, and that J. C. Auten said that the claimant would bear the costs of all construction within and along the claimant's right of way in connection with the said proposed siding.

13. The claimant's attorney stated that he does not claim that an agreement was made by the claimant with any Government official to build said track within the claimant's right of way. He contends that said track within said right of way was necessarily built and that an implied obligation arises on the part of the Government to pay the cost of it.

14. The procurement order No. G811-348Tw, dated November 3, 1917, calls for completion of work within 60 days. The claimant's witness, Mr. Whittingham, testified that the claimant completed its work on the said siding in February, 1918. Capt. Edwin M. Chance, the engineer representing the Government in the said construction work, testified that the claimant's work was not properly completed; that the construction was poor and the rails were relayers. A large number of the rails were condemned and had to be relaid. Capt. Chance observed that the claimant was having difficulty with its workmen and that the service was unsatisfactory and slow. He therefore took over the work, employed 8,000 men and completed the work himself.



## DECISION.

1. The procurement order of November 3, 1917, calls for the completion of work within 60 days, and meets the provisions of General Order No. 7 (1917) of the Chief of Ordnance. It therefore conforms with the terms of 6854 of the compiled statutes and is formal. As the work has been terminated, the Secretary of War and, therefore, this Board, has lost jurisdiction of the claim growing out of this procurement order.

2. Inasmuch as the procurement order of December 11, 1917, by its terms, covers work theretofore performed, it is not a formal document within the terms of 6854 of the compiled statutes and this Board may take jurisdiction under the act of March 2, 1919. We find that the said order of December 11, 1917, sets forth the terms of the agreement between the parties with the exception that the phrase in said order, "plus a profit of 10 per cent," should be eliminated. So modified, it sets forth the terms and conditions of the agreement between the United States and the claimant under which the claimant performed work on an additional siding from a point on the first-mentioned siding for a distance of approximately 2,880 feet on the Government's land.

3. There is no obligation upon the Government to pay for the said trackage built upon the railroad right of way for the reason that J. C. Auten, engineer of the Philadelphia, Baltimore & Washington Railroad, agreed for and on behalf of the claimant, to build all trackage within the railroad's right of way at the expense of the railroad, and for the further reason that the expenditures were made in connection with a change in the original plans, which change was not authorized or requested by Government officials, but was made by the railroad upon its own initiative and for its own purposes.

## DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the second agreement, the terms of which are set forth in the instrument of November 20, 1917, and certificate C, to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Fowler concurring.



JUNE 30, 1920.

**Case No. 2798.**

***In re* CLAIM OF THE BETHLEHEM SHIPBUILDING CORPORATION.**

- 1. CONSIDERATION—CHANGE IN PRICE.**—Where the claimant agreed to bore steel bars at a fixed price and during the performance of the work demanded and was promised additional compensation, there was no consideration to support the promise and the additional compensation can not be allowed.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$12,240.28 additional compensation for boring steel bars. Held, claimant not entitled to recover.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$12,240.28, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant corporation owns and operates a shipbuilding plant at Quincy, Mass. The Watertown Arsenal needed to have some boring done on 6 and 4 inch steel bars. The bars were long ones, and the claimant company seemed to be the only concern east of Chicago that could do the work. The claimant was reluctant to postpone other work on which it was engaged, but consented to make the borings as requested by the arsenal. The terms suggested by the claimant were that it should be paid at the rate of \$1.78 per hour for each hour of labor. On June 7, 1918, a purchase order, No. 13152, was issued by Col. C. M. Wesson, commanding officer of Watertown Arsenal, calling for the boring of the bars at the price stated of \$1.78 an hour. After the claimant had begun the work it realized that its bid of \$1.78 an hour was going to result in a substantial loss to it. On July 15, 1918, the claimant wrote the Watertown Arsenal to the effect that it would be put to a considerable loss if the contract price was not increased. On July 22, 1918, Col. Wesson wrote the claimant a letter, as follows:

"Answering your letter of July 15th (W. A. 473.26/13353). We note your comments. It is the intention of this arsenal to handle

this matter in the most equitable way possible, at the same time bearing in mind that it is our duty to protect the interests of the United States.

"We would call to your attention the fact that work has been postponed this week on the boring bars owing to the influx of other work at your plant. We would point out, therefore, that the proper time for discussing an increase in the rate will be after the job has been completed as per your agreement.

"If, therefore, you will have the job finished up as per contract, immediately upon completion of the work we will take up the matter of increased compensation and we believe that we can arrive at a mutually satisfactory understanding in regard to price."

3. It is conceded that the claimant is entitled to be paid in accordance with the purchase order the amount arrived at by multiplying the number of hours consumed in boring the bars by \$1.78. It asks for payment in addition by reason of the assurance contained in the third paragraph of the quoted letter. There is evidence from the officers of the Government to the effect that the purchase order price of \$1.78 per labor hour was less than the cost of operating the two lathes that were required.

#### DECISION.

1. The claimant having agreed to do the work of boring the bars at a price of \$1.78 per labor hour, it is bound by its agreement. Where a contractor has entered upon the performance of an undertaking at a fixed price he is not justified in stopping work and in requiring assurance of additional compensation as a condition for resuming performance of the contract. A promise on the part of the other party to the agreement that additional compensation would be made is without consideration and is not enforceable. That was the situation in respect to this claimant in July, 1918. It agreed to bore the bars for a compensation measured by a payment of \$1.78 per labor hour. The claimant is entitled to that amount and to no more.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate "C" to the Ordnance Claims Board for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Mr. McCandless and Mr. Tanner concurring.

JUNE 30, 1920.

**Case No. 2562.**

*In re* **CLAIM OF PFAU MANUFACTURING COMPANY.**

1. **CHANGES IN SPECIFICATIONS.**—Where claimant's contract provided that if changes in specifications should be made involving additional expense, a fair addition to the contractor's compensation might be made as determined by the Chief of Ordnance, claimant may be entitled to such additional compensation even though the changes resulted in a cheaper product, provided that claimant proves that its extra expenses on account of the change exceeded the savings in cost of production.
2. **CLAIM AND DECISION.**—Appeal from the decision of the Ordnance Claims Board denying relief on a claim under the act of March 2, 1919, for \$93,546.42, based upon a proxy-signed contract for machine-gun water boxes. Held, claimant is entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under G. O. 103. Statement of claim, Form A, was filed originally under the act of March 2, 1919, and the claim comes to this Board on appeal from the decision of the Ordnance Claims Board. The claim in reality arises out of a dispute in connection with a clause in a written contract and should be treated as arising under G. O. 103.

**STATEMENT OF FACTS.**

1. On or about February 20, 1918, claimant entered into a proxy-signed contract No. Work Order 2154-2152 with the Ordnance Department for the manufacture of 100,000 water boxes for machine guns and parts therefor.

2. This contract specified the prices for the finished articles and delivery dates and contained the following clause as to changes in drawings and specifications:

“The Chief of Ordnance may by written notice to the manufacturer at any time make changes in the drawings and specifications or substituted drawings or specifications which relate to, form a part of, or are added to this contract. If such changes involve additional expense a fair addition may be made to the compensation but if such changes involve less work or labor or material a fair deduction may be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for addition or deduction on account of any change will be made or allowed unless the same has been ordered in writing by the Chief of Ordnance.”

3. This contract was based on Ordnance Office drawings Nos. 60, 63, 64, and 77, furnished by the Government. The contract was later amended by supplemental contract relating to packing of the boxes but not affecting this claim.

4. The claimant has completed performance of the contract and has been paid in full for all boxes delivered.

5. Although the contract is dated February 20, claimant actually received oral instructions prior to that date from the Ordnance Department to undertake the work that was finally covered by the contract terms, and before February 20 had made commitments and preparations for that purpose based on the above drawings. At the time of the receipt of the contract, therefore, about February 20, claimant had already begun operations in reliance on the specifications as finally stated in and confirmed by the contract, so that any change in specifications would involve change of operating plans.

6. About February 25, 1918, claimant was directed by the office of the Chief of Ordnance to suspend operations until certain changes could be made in the design of the box. These changes were subsequently decided upon and their direction was embodied in written instructions and amended drawings furnished to claimant from time to time. These changes were finally all effected prior to July 22, 1918, by which time claimant was prepared to start quantity production on the new type of box.

7. It is for the unexpected and extra expense alleged to have been occasioned by these changes made in pursuance of these instructions that claim is brought. Relief was denied by the Ordnance Claims Board on the ground that as the new box as finally adopted appeared to be a cheaper box to manufacture it did not appear that claimant's expenditures due to the changes had not been in fact offset by savings due to the lesser expense of making the new form of box and therefore that no actual loss for which claimant might be entitled to reimbursement under its contract had been shown by claimant.

8. In view of this difference of opinion and with a view to ascertaining the extent of claimant's outlays due to the changes, if any, an independent audit of claimant's accounts has been made with claimant's cooperation by the Technical Section of this Board, and there are in evidence reports dated June 30, 1920, of William Linden and John P. Chamberlain, accountant and mechanical engineer, who made this audit, embodying their findings in this respect. Their reports set out the basis of their calculations and allow claimant a total of \$47,164.75 by way of full reimbursement, conceding the validity of the claim to that extent. Claimant is willing to accept these findings as far as they go, but contends that they should be

modified in certain particulars, both in methods and figures, so as to raise the sum allowed to a larger total.

9. The modifications asked by claimant are as follows:

First. Paragraph A, Item 2: The overhead is claimed to be erroneously calculated through a clerical arithmetical error.

Second. Paragraph B, item 1: Claim is made that in calculating this excess labor the actual increased rates per hour paid therefor should be considered as well as the increased number of hours worked.

Third. Paragraph F, item 2: No credit should be allowed the Government on this account because claimant's fixed charges were not appreciably reduced by the elimination of these parts.

Fourth. That the proportion of productive labor considered by claimant as applicable to other contracts during the period from April 9 to July 22, 1918, and estimated by it at 18.77 per cent should bear no part of the excess overhead.

Fifth. That claimant should be allowed 10 per cent on the net amount of its claim composed as above as interest on money absorbed in work required by the changes and removed from other profitable employment.

A hearing on the claim was held June 21, 1920.

#### DECISION.

A consideration of the evidence in this case as presented to this Board leads to the following conclusions:

1. Claimant had a valid contract with the Ordnance Department based on instructions and specifications furnished to it at or before the execution of the contract and on which it had a right to rely until furnished other instructions as authorized by the contract terms.

2. The changes in specifications on which the claim is based were duly authorized and approved as provided by the contract, were complied with by claimant and resulted in additional expense beyond any saving effected thereby and claimant is entitled to be reimbursed the reasonable amount such additional expense beyond any such saving.

3. As to what is the amount and proper method of computation of such additional expense the best evidence is the above-mentioned reports of Messrs. Linden and Chamberlain.

4. In reaching an adjustment of this claim the Claims Board should take said reports into consideration and is authorized to award to claimant a sum not exceeding the \$47,164.75 allowed by said reports plus any such sums as may be found to result from:

(a) A correction of any arithmetical error that may exist in the computation of the overhead stated in paragraph A, item 2, of the report of Mr. Linden.

(b) A recalculation of the excess labor under paragraph B, item 1, of Mr. Linden's report. In calculating the excess labor cost due to added operations caused by the changes the rate of pay actually paid by claimant on such added operations should be applied to the time worked, credit being allowed for any saving to claimant in labor cost due to the changes.

5. As respects the further contentions of claimant, third, fourth, and fifth above, claimant has not satisfied us that the reports are erroneous in regard to the matters the correctness of which claimant disputes, either in theory or amounts allowed, and has not furnished us any sufficient basis for its request for a modification of the findings as stated in the reports. The claim in respect of these three items is therefore denied.

#### DISPOSITION.

The claim will be returned to the Ordnance Claims Board for appropriate disposition in accordance with this opinion.

Mr. McCandless and Lieut. Col. McKeeby concurring.

FEBRUARY 16, 1920.

**Case No. 297.**

*In re* **CLAIM OF INDUSTRIAL ENGINEERING CO.**

**ON APPEAL BEFORE THE SECRETARY OF WAR.**

- 1. CLAIM AND DECISION.**—This claim was disposed of by the Board of Contract Adjustment August 12, 1919, by denying relief to the claimant (Vol. I, these decisions, p. 332). Claimant appealed to the Secretary of War, who, upon the 16th day of February, 1920, affirmed the decision of this Board.

In accordance with the accompanying recommendations of two of the special advisers, the decision of the Board of Contract Adjustment in this matter is confirmed.

It is directed, however, that such approval be without prejudice to the consideration of the accompanying claim of the Industrial Engineering Co. as the claim of a subcontractor seeking payment out of any award which may be made upon the claim of the American Machine Corporation, and it is directed that the record herein, with a copy hereof, be transmitted to the Ordnance Bureau Claims Board for its consideration.

I am advised that one of the objections to the allowance of the claim of the American Machine Corporation is based on the supposed failure of that company to file its claim before June 30, 1919. The present claim of the Industrial Engineering Co. having been seasonably filed, it is directed that as to any portion of the claim of the American Machine Corporation which is due or payable to the Industrial Engineering Co., the claim shall be treated as having been presented as of the date on which claim of the Industrial Engineering Co. was presented.

NEWTON D. BAKER,  
*Secretary of War.*

**MEMORANDUM.**

The American Machine Corporation of Port Huron was under contract with the Ordnance Department to furnish 200,000 75 mm. shells. Certain gauges are required in the manufacture of such shells and the contract required the machine company to furnish them. It did not itself make them, but contracted with this claimant that the latter should make and deliver them to it at a certain price. The claimant made gauges and delivered them to the Machine Corpora-



tion, but has not been paid for them, \$7,780.90 being due. An involuntary petition in bankruptcy has been filed against the Machine Corporation and it is now insolvent.

The claim does not indicate that allowance of the claim should be made from any balance due the prime contractor (for the shells) from the Government. Dent Act, section 4. The claim states that on May 25, 1918, claimant entered into an agreement with an officer or agent acting under the authority, direction, or instruction of the Secretary of War for gauges to be used in the manufacture of shell; that claimant completed the work by September 20, 1918; that the goods were delivered, received, inspected, and accepted by the Ordnance Department operators and that \$7,780.90 is due claimant for the same from the United States.

The specification of facts in the claim, however, indicates that there was no such contract of sale by claimant to the Government. It is stated that claimant contracted with the Machine Corporation to furnish it with the gauges at an agreed price; that after the work of making the gauges was well started claimant discovered that the Machine Corporation was in financial difficulties and therefore stopped work on the gauges. That thereupon Capt. Strand (a production engineer assigned to the chief of the Detroit district ordnance office) "personally and by telephone ordered claimant to proceed with the work, stating that the Government would see to it that claimant got its money. The claimant, therefore, went ahead with the work *under the same terms and conditions as before.*" These terms and conditions were to manufacture gauges for and deliver them to the Machine Corporation, which was to pay the stipulated price therefor.

It is apparent then that the alleged agreement upon which claimant relies is not one to purchase and pay for the gauges, but to guarantee the performance of the Machine Corporation's contract so to do. The sole question to be determined is whether or not the testimony as to conversations between the representatives of the claimant and officers of the Production Engineers force will support a finding that there was an oral agreement to that effect. Certainly the agreement suggested is a most extraordinary one. It might not be surprising that, if the circumstances warranted their doing so, Government officers might agree that payment would not be made to the prime contractor until an individual, who had furnished him with material to do the work, had been afforded an opportunity to recover what was due him out of such payment if he could. But that any officer or agent, military or civil, would undertake to have the Government guarantee the payment of a debt due, by one private citizen to another, is a startling proposition, not to be accepted without very clear and convincing proof in its support.

The Board in its findings has quoted at considerable length from the testimony; so far as possible, repetition of these quotations will be avoided in this memorandum. Claimant introduced an affidavit of its president, Mr. Bouvier, to the effect that in the latter part of June, 1918, he was called up on the telephone by Capt. Strand and asked why he was not delivering gauges to the Machine Corporation; that he replied they were unable to pay and that he did not care to go ahead further; that Capt. Strand in reply stated that: "We were holding up material badly needed by the Government and that we were going altogether too far in withholding gauges needed to produce munitions; further, that the Government stood behind that contract, that we would get our money, and that we should proceed with the work."

Witness is to some extent corroborated by claimant's treasurer, Mr. Barbey, who was in the office at the time but who was not on the wire. Capt. Strand testified that he has no recollection of this telephone conversation. It is quite easy to reconcile these statements on the supposition that the announcing call on the phone was "Capt. C. A. Strand's office speaking." The testimony shows that this was a not unusual form of introduction, and it would not be remarkable if the person at the receiver failed to note the word "office." The captain further says that all his conversations with Mr. Barbey were had after the gauges had been delivered.

The only other witness for claimant was Mr. Barbey, who testified to several conversations with Mr. Paull, also a "production engineer" in the Detroit ordnance office. See quotation in the memorandum of the Board.

The situation was this: Upon obtaining the contract the Machine Corporation applied to the War Industries Board for an advance payment. There was considerable opposition to this, but a Mr. Armstrong, who was the president of the corporation and who seems to have been a persistent and persuasive individual, succeeded on January 22, 1918, in securing a full 30 per cent advance (\$129,000). The plant of the corporation was completely destroyed by fire on April 28, and as it had produced nothing, its contract was canceled. Mr. Armstrong, however, succeeded after a brief delay in having the contract reinstated, and the corporation set to work rebuilding its plant. There was a large amount of insurance (\$180,000) on the plant. Mr. Paull and Capt. Strand had several conversations with Mr. Armstrong, in which the latter assured them that definite arrangements had been made for the payment of the total amount of insurance. He also stated that he had made arrangements for securing money from eastern financial interests. The testimony does not disclose any simple statement to claimant's representatives to the

effect that if it would deliver the gauges the Government would pay for them. The production officers explained the reasons why they felt they could assure claimant that it would be paid; they told claimant's representatives that the contract was in force (had been reinstated; Mr. Barbey says he did not know it had ever been canceled); that the Machine Corporation was collecting big insurance; that it had made arrangements for financing; that if it could get the gauges so that it could complete its shell contract there would be money coming to it out of which a subcontractor would be sure of payment; that even if the Machine Corporation should default on its contract, the gauges could be used by other concerns in the Detroit district.

The claim included items of charge for some gauges which had been delivered *before* any of these conversations with the Government officers occurred. In explaining why these were included Mr. Barbey testified "I expected to be taken care of the same as with all other Government work which I had known; the Government reimbursed and saw that the subcontractor got his money before the contractor got his money, or at the same time."

In my opinion, the testimony indicates the making of statements to the representatives of the engineering company that if it would proceed with its work so that the Machine Corporation could complete the shell contract, it would surely get its money, because (as it was expressed in the telephone conversation) "the Government stood behind that contract." The testimony does not, however, in my opinion, sustain a finding that there was an agreement to the effect that if the Machine Corporation wholly failed to carry out its contract—in fact, it never delivered a single shell—the Government would guarantee the payment of its indebtedness to the claimant for gauges furnished. If such an agreement was being proposed or assented to by officers of the Government, there would have been no elaborate statements of the reason why it was supposed the Machine Corporation would be able to complete its contract and pay its own debts. Nor would there have been any necessity for appealing to the patriotism of claimant. (Barbey, p. 98.) If the Government were offering itself to pay for the gauges, claimant would have been ready enough to deliver them as a mere business proposition. Unless such an agreement be proved, there can be no recovery under the Dent Act.

I recommend that the decision of the Board be affirmed.

Respectfully submitted.

(Signed)

E. HENRY LACOMBE,  
*Special Adviser.*

February 10, 1920.

## MEMORANDUM FOR THE SECRETARY OF WAR.

From an examination of the record in this case I think that the Board of Contract Adjustment was right in holding that there was **no agreement whereby the United States assumed or guaranteed payment of this claim.** It appears, however, that there is now pending before the Ordnance Bureau Claims Board a claim on behalf of the American Machine Corporation, the prime contractor under whom the Industrial Engineering Co. had its contract. As section 4 of the act of March 2, 1919, permits payment to subcontractors under certain conditions, and especially as I am advised that the claim of the prime contractor is objected to by the Government on the ground that it was not presented before June 30, 1919, while the present claim of the Industrial Engineering Co. was seasonably filed and presumably is included in the claim of the prime contractor now before the Ordnance Bureau Claims Board, it seems clear that sound administration requires that the present claim be forwarded to the Ordnance Bureau Claims Board, and that the affirmance of the decision of the Board of Contract Adjustment be without prejudice to the consideration of this claim in connection with the claim of the prime contractor.

As the United States had seasonable notice of the existence of the claim on which this subcontractor sought payment, and of the name of the prime contractor under which the claim was alleged to have accrued, I think that the Ordnance Bureau Claims Board should be advised that any portion of the claim of the American Machine Corporation which may properly be payable to the Industrial Engineering Co., up to the amount of the present claim of the last-named company, should be considered as having been presented on the date on which the present claim of the Industrial Engineering Co. was presented.

R. C. GOODALE,  
*Special Adviser.*

FEBRUARY 27, 1920.

**Case No. 30.**

*In re* **CLAIM OF HEIDELBERG, WOLFF & CO.**

**ON APPEAL BEFORE THE SECRETARY OF WAR.**

- 1. CONSTRUCTION—DEGREE OF CARE REQUIRED.**—Where a contract for the manufacture of uniform coats from materials furnished by the Government provides that the Government will hold the contractor responsible for such materials, and that it will be held liable for any loss or damage thereto from any cause whatever, the contractor is bound to use its best efforts to avoid all possible waste, such being the care a reasonably prudent man would use in cutting his own textiles under the circumstances of this case. (I, these decision, 284.)
- 2. SUPPLEMENTAL AGREEMENTS—BONUS—CONSTRUCTION—CONSIDERATION.**—Where a contract for the manufacture of uniform coats from materials to be furnished by the Government, containing the provisions referred to in syllabus No. 1, is amended by a supplemental contract providing for additional compensation by way of a premium or bonus to the contractor based on its obligation to "use best efforts to avoid all possible waste," the clause quoted imposed no additional obligation on the contractor and is therefore no consideration for the promise of additional compensation. Hence such supplemental agreement is void and the contractor is not entitled to the bonus therein provided. (Following decisions of this Board in this case reported in Vol. I, Decisions of War Department, Board of Contract Adjustment, p. 287, but overruling this Board's decision in the case on a rehearing.)
- 3. CONTRACT, CONSTRUCTION OF—BONUS.**—Where an original contract for the manufacture of uniform coats from materials to be furnished by the Government contains the provisions stated in syllabi Nos. 1 and 2 such provisions are not separable, but when taken together, in the absence of any evidence that the contractor did not fulfill its obligations, is the measure of the contractor's compensation and the contractor is entitled to the bonus therein provided. (Reversing on this point in this case, reported in Vol. I, Decisions of War Department, Board of Contract Adjustment, p. 287, and following this Board's decision on rehearing as to the construction of the contract, but making a contrary finding of facts.)
- 4. SECRETARY OF WAR, APPEAL TO—QUESTIONS CONSIDERED.**—Where an appeal is taken to the Secretary of War from the decision of this Board only such questions will be considered as are raised by such appeal, and in this case the decision of this Board on rehearing, that it had no jurisdiction to determine a controversy with reference to rags and clippings, will not be passed upon by the Secretary of War.
- 5. WITHHOLDING PAYMENT.**—Where the Secretary of War decides that claimant is entitled to recover a bonus provided in a contract for the manufacture of uniform coats from materials furnished by the Government, and there is a dispute as to whether the Government or the contractor is entitled to the rags and clippings, which has not been decided, payment will not be made until such dispute is determined.

**6. CLAIM AND DECISION.**—Claim under G. O. 103 for bonus under a supplemental contract and for bonus under an original contract. Held, claimant not entitled to bonus under the supplemental contract, but entitled to bonus under original contract.

This matter having been brought before me on appeal from a decision of the Board of Contract Adjustment, upon consideration of the entire record it is ordered that further proceedings be taken with a view to effecting settlement of this claim in accordance with the memoranda and recommendation of the advisers, herewith transmitted, which are hereby approved.

As the Board of Contract Adjustment in its decision on claimant's petition for rehearing found that claimant's obligation to account to the United States for rags and clippings was not involved in this case, I have not considered this question as before me on the present appeal. Payment will, of course, not be made to claimant until such liability, if any, has been determined and properly adjusted.

As soon as practicable the papers in this case should be returned to the Attorney General for such further investigation or action on his part, if any, as he may find the circumstances require.

(Signed)                NEWTON D. BAKER,  
Secretary of War.

**MEMORANDUM FOR SECRETARY OF WAR.**

Three separate questions were considered by the Board of Contract Adjustment, viz:

(a) Whether under a contract with claimant for the manufacture of service coats and overcoats from Government-owned material the "rags and clippings" belonged to the Government or to the contractors? This contract, No. 1646, was entered into April 12, 1917.

(b) Whether under a supplementary agreement dated October 10, 1917, purporting to amend this contract claimant was entitled to a certain bonus of 20 per cent on the net cost price of certain uncut yardage?

(c) Whether under a contract dated October 22, 1917, for manufacture of service coats from Government-owned material plaintiff was entitled to a like bonus on uncut yardage?

(A) In the matter of claim A, the Board in its first decision discussed the facts and the law at considerable length and made findings thereon. Upon petition for rehearing the Board reached the conclusion that the question of rags and clippings was not before it in the present case and abrogated their former findings, making no adjudication on such question. This appeal, therefore, brings no such questions here.



(*B*) The contract of April 27, 1917 (No. 1646), was in writing, signed by the claimant and by an officer of the Quartermaster Corps. It comes within the provisions of the Dent Act, because, in order to make it technically an obligation of the Government, it should have been signed by some other officer. The same remarks apply to the other contracts here considered; the claims therefore are of the sort known as class A. The written contracts are not merely memoranda; they appear upon their face to be carefully prepared, with full specifications. For that reason we are not here concerned with what may have been the belief or expectation or understanding of either party. All that there is to do (under subjects (*B*) and (*C*), *supra*) is to construe three written contracts as a court would construe them had they been properly signed and the contractor had brought suit to recover under them.

The contract of April 12, 1917, provided that the contractor should manufacture certain coats and overcoats out of textile materials, principally woolens, which belonged to the Government, at a unit price of \$1.749 for each coat and \$1.947 for each overcoat.

It provided that—

“The Government will hold said contractor responsible for material furnished him and poor workmanship, whenever and wherever found, and will make reclamation for full loss to the Government.”

Also that—

“The contractor will be held liable for any loss of, or damage to, any material furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession.”

What obligations did the contractor assume under this contract?

The cloth belonged to the Government, which had bought and paid for it; it was delivered to the contractor solely for the purpose of being by him manufactured into coats. Indisputably this was a contract of bailment; the cloth remained the property of the Government from the beginning to the end of the transaction. So much of it as went into the garments was returned to its owner when they were delivered. Whatever surplus cloth was left over after the work of manufacture was completed was the property of the Government and it was the duty of the contractor to return it to the owner.

How much surplus there might be would depend upon the degree of care with which the yardage had been cut up into the shapes required to form the finished garment. The question here presented is what degree of care was required by this contract. Of that question there has been an elaborate discussion, which is found in the record. The answer seems to be a simple one. The contractor was cutting up material which did not belong to him; he should have been as careful in dealing with that material as he should have been were he han-



dling his own. He was bound, therefore, to use the same degree of care that a reasonably careful, prudent man would exercise in cutting up his own material. That, of course, might vary with the circumstances; if the market were always fully supplied with such material and the cost of it were trifling, he might not take any special pains to cut economically; but if the cost were high and the supply so scant that it was very difficult to get material at any price, he would presumably use his best efforts to avoid all possible waste. If under these circumstances he did not do so, to his own pecuniary loss, one would expect a jury of ordinary intelligence to hold that he was not acting as a reasonably careful, prudent man would. If the claim arose upon a legally signed contract, coming to trial in court, the judge should refuse to charge that the care required was "that of a reasonably careful, prudent man, dealing with his own material," and should charge instead that it was the "care usually exercised by this contractor," or the "care usually exercised by persons in the trade," one would expect that an appellate court would find such refusal to be reversible error. This contractor might habitually be careless or the trade generally might be extravagant, but the law requires that the person who takes possession of another's property in this way should handle it as a reasonably careful, prudent man would.

In these cases the Board passes on the facts as well as law and is bound, as I understand the act, to act thereon as an intelligent jury would, upon the relevant facts of this case, without giving any consideration to the question whether or not some other contractor differently situated is receiving higher pay for similar work.

On October 10, 1917, a supplemental written agreement was entered into; this also was signed by some officer other than the one legally designated, and so comes before the Board. After certain recitals (hereinafter referred to) it provides that—

"In cutting textile materials furnished by the United States for use in the manufacture of garments, etc., under said contracts, the contractor shall use best efforts to avoid all possible waste. For the additional work and special care so involved, the contractor shall be paid as separate compensation and premium an amount equal to twenty per centum of the net cost of such Government-owned materials, to the extent of the saving in uncut yardage on comparing the quantities actually used in the cutting with the allowances for the purpose listed in the accompanying schedules—the material of the yardage so saved to remain the property of the United States. There shall not, however, be any skimping whatever in the cutting for the garments, etc., and in the event of the violation of this condition, no compensation shall be made for the saving in yardage resulting from the lays of such skimmed cuttings; and the Government shall also have the election of annulling the contracts for such cause."

It is contended that this supplemental contract is void, because no consideration passed under it to the Government. It provided that the stipulations of the original contract shall remain in full force and effect. The original contract provided that the contractor shall be liable for any loss of or damage to any of the Government material from any cause whatsoever while in his possession. It is provided in the supplemental contract that there should not be any skimping whatever in cutting the garments, but as the dimensions were given in the original specifications and the contractor had agreed to conform to them, this clause imposed no additional obligation. That surplus yardage was to remain the property of the Government was provided for in the original contract, which, so far as the textile materials were concerned, was a contract of bailment. The obligation to "use best efforts to avoid all possible waste" already existed, because, as has been stated above, conditions were such that this is just what a reasonably careful, prudent man would do when cutting up his own textiles.

The conclusion is reached that the Government received no consideration under the supplementary contract; that the bonus named therein was therefore a mere gratuity; that such contract is void and that the claim under it should be disallowed.

(c) On October 22, 1917, the Government and this contractor entered into another contract, No. 2277. The original contract is not before me, but the record indicates that it was a complete document in the usual form, with many clauses and specifications providing for the manufacture, out of textile materials to be furnished by the Government, of 100,000 coats at a unit price of \$1,649. Also that it contained the clauses found in No. 1646 as to the contractor being held responsible for any loss of or damage to Government material from any cause whatsoever. (These clauses are quoted *supra*.) It also contained a clause as to bonus, textually the same as the one last above quoted from supplementary agreement.

The circumstances which brought about the insertion of this clause in No. 2277 and in other similar contracts are indicated in the preamble to the supplementary contract. It recites that "a considerable yardage in cloths, etc., furnished contractors for the manufacture of coats, breeches, and other articles cut from patterns has been lost to the Government through careless and inefficient cutting, whereby the saving in uncut cloth returned to the Government is materially reduced, and in order to encourage skillful and painstaking cutting from the patterns furnished contractors it is to the interest of the United States that the clause providing for the bonus on uncut yardage above certain schedules be made a part of the contract."

Apparently contractors were not all fulfilling their obligations; they were not cutting Government-owned textiles with the degree of

care which a careful, prudent man would exercise if he were cutting his own material—material expensive and very difficult to obtain promptly on the market, because demand exceeded supply.

This might have been rectified by increased rigidity and persistence of inspection. This presumably would have required a considerable increase in the force of inspectors, so that a sharp watch could be kept on all cutters at all times. The number of skilled inspectors available may have been limited and it might have taken much time to train unskilled men. Doubtless in October, 1917, the necessity for a prompt increase in the supply of coats was acute. Whatever the moving cause was, the Government officials decided to adopt another method. The inefficiency of the contractors was probably due to the circumstance that, although the law and their contract required them to be as careful with Government-owned cloth as they should be with their own, they could not eliminate from their minds the fact that it was not their cloth, that they had not paid for it and would not be allowed to retain any uncut yardage and that, therefore, loss involved in wasteful cutting would not come out of their own pockets.

If, however, the contract were so worded that avoidable waste would reduce the amount of their stipulated compensation, it might be expected that they would exert themselves to live up to their obligations and to take such measures to avoid waste as a reasonably careful, prudent man would take when cutting up his own cloth under existing conditions of cost and market. The question whether or not this contract, phrased on these lines, was improvident is not here for discussion. There is nothing to show that it was illegal, or unconscionable, or fraudulent, or the result of mutual mistake. The only question here presented is its construction.

Most of the memorandum opinions found in the record construe the document as containing two separable contracts. In that construction I do not concur, but agree with this statement found in the memorandum of Mr. Eaton, member of the Board, dated September 11, 1919:

“There can be no real question of lack of consideration in this contract. It is a brand-new one made in consequence of proposals which were issued in the regular way. The price for which the contractor undertook to manufacture the coats was fixed as one of the terms of an entire contract. It is not possible to split the contract into parts and now maintain that the provision for a twenty per cent premium on savings in cutting was not one of the inducements that the contractor relied on in entering into the contract.”

The unit price per coat in the old contract was \$1,749; in this it is \$1,649 plus a sum of money equivalent to 20 per cent on the cost of uncut yardage over schedule allowance. That is to be the contractor's compensation for doing the work called for. As has been

stated above, the terms of the contract—other than those enumerated in the clause under discussion—obligated him to use “best efforts to avoid all possible waste,” because that was precisely what a reasonable, careful, prudent man would do when cutting his own cloth under existing conditions of cost and market. The use of this phrase in the clause added nothing to this obligation. It did, however, so regulate the compensation to be paid that the contractor’s mind would be continuously impressed with the conviction that loss through avoidable waste would come out of his own pocket, just as it would if he were cutting his own material; thus he would be stimulated to use his best efforts to fulfill his obligations under the contract.

There is nothing in the record to indicate that this particular contractor failed in any way to fulfill its obligations. Its methods of cutting were the same from April 12, 1917, to the completion of the work under both contracts and there is no suggestion that there was any waste from first to last which it might have avoided. Apparently it used at all times its best efforts to avoid waste and was as careful with Government-owned material as it should have been with its own.

The conclusion is reached that claimant, having fulfilled all its obligations, is entitled to be paid the price which the Government agreed to pay for such fulfillment.

Respectfully submitted.

(Signed)

E. HENRY LACOMBE,  
*Special Adviser.*

FEBRUARY 17, 1920.

I fully concur in the above memorandum and recommendation of Judge Lacombe.

R. C. GOODALE,  
*Special Adviser.*  
WILLIAM H. DAVIS,  
*Special Adviser.*

MARCH 4, 1920.

**Case No. 1548.**

*In re* **CLAIM OF LEVY OVERALL CO.**

- 1. DEFAULT BY GOVERNMENT—RIGHTS OF CONTRACTOR.**—Under a contract for the manufacture of clothing from materials to be furnished by the Government, where the Government was in default in delivering material, the contractor could have terminated the contract.
- 2. SAME—DAMAGE NOT WAIVED BY SUBSEQUENT PERFORMANCE.**—Where the contractor did not terminate the contract, but proceeded to manufacture the clothing out of the materials finally furnished by the Government, such action did not necessarily constitute a waiver of damages arising from the Government's default. Where the contractor continuously protested against the delay there was no waiver merely because the protests showed a misconception of the rights of the contractor.
- 3. SAME—DAMAGES.**—The contractor is entitled to compensation to the extent of actual damages directly caused by the default of the United States.
- 4. CLAIM AND DECISION.**—Claim presented under G. O. 103, arising from a proxy-signed contract for the manufacture of denim overalls. Held, claimant is entitled to recover damages for the default of the Government.

Mr. Montgomery writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented under G. O. 103, War Department, 1918, and is for \$4,200, under the following circumstances:

2. About the middle of March, 1918, claimant sought of John Wiechers, then connected with the Clothing and Equipage Division of the Quartermaster's Department, a contract for the manufacture of 30,000 pairs of denim trousers and 30,000 denim coats, and offered to make them at a unit price of 31 cents upon the understanding that they would be made in claimant's factory during the months of May, June, and July, at the rate of 20,000 garments per month. Under date of April 18, 1918, claimant was notified by a letter from Col. H. J. Hirsch, Quartermaster Corps, purchasing and contracting officer, by Capt. H. M. Schofield, Quartermaster Reserve Corps, that, in accordance with claimant's offer, the contract was awarded it. The letter set forth the specifications in detail and contained this provision:

"The Government will furnish the necessary denim and the patterns."

3. Across the face of this letter is stamped the following:

"This is your authority to proceed without delay pending the preparation and completion of formal contract."

4. An instrument designed to be a formal contract, dated April 16, 1918, No. 1940-J, was forwarded to claimant, with a letter dated April 23, 1918, and by letter dated April 29 claimant returned it, asking that the date be changed, upon the ground that claimant's agreement had contemplated commencing manufacture on May 1, and that it was then too late to start work by that time because of the necessity of submitting samples and having them approved before production could begin. This letter also stated that the writer understood the unit price was likely to be increased soon and that claimant would like to have the benefit of such increase, and also requested another minor change. Several other letters passed between the parties, but the Government officers refused to make any change, and finally, about the 1st of July, the contract as originally presented was signed by claimant. It is informal in that it was signed on behalf of the contracting officer, Col. Hirsch, by Capt. Shaffer, Q. M. Reserves C.

5. At least as early as May 15, and presumably earlier, claimant began to urge the Government to deliver the necessary denim. Under date of June 13, Mr. Wiechers wrote claimant in reply to its request for material, dated June 13, that the department was doing everything possible to get it, and requesting claimant to take the matter up with the depot quartermaster at Jeffersonville, who had charge of the claimant's shipment.

6. Under date of June 20, claimant replied to Mr. Wiechers' letter of June 18:

"We are sorry to say that apparently our many efforts to get materials, or even to find out who is in a position to inform us definitely when we may expect denims, have met with utter failure. As we wrote you June 12, we have exhausted every means of communication with everybody to whom we were referred.

"In the meantime, we had to shut down our plant because the Government commandeered our denims at the mills, and the Government-owned denims have so far failed to put in their appearance, although our contract, No. 1940-J, was awarded over 60 days ago."

7. Claimant got ready to manufacture, but when it was prepared to begin the denim which the Government was required to furnish was not forthcoming, and claimant did not receive the first shipment of material until July 9, 22 days before the time when the contract should have been completed.

8. Samuel Levy, the president of claimant, protested by letter from time to time while carrying out the contract that the delay of the Government had increased the expense to claimant of perform-



ing the contract to such an extent that claimant was fairly entitled to 38 cents per garment, the price which the Government had fixed for other manufacturers more than a month before the Government's first deliveries of denim to the claimant.

9. Mr. Levy testified that claimant lost money at 31 cents per garment, and would have lost money even at the unit price of 38 cents, but claimant states its claim not upon the actual damage it suffered but upon the price other contractors were receiving for making these garments at the time claimant made them. This, Mr. Levy testifies, is less than the claimant's actual loss by reason of the delays.

10. The first delivery of material by the Government consisted of duck instead of denim, and although where duck was used an extra 3 cents per garment was allowed by an amendatory contract dated September 4, 1918, effective as of April 16, 1918, claimant insists that it suffered damages for which it was not adequately compensated by such allowance.

#### DECISION.

1. The claimant has shown no right to the unit price of 38 cents, on which it states its claim. The contract fixed the price at 31 cents, and the Government repeatedly refused to alter it. Claimant can recover, if at all, only the increase in its manufacturing cost directly due to the Government's failure to deliver material at the time required by the contract.

2. The contract is to be treated as running from its date, April 16. The Government repeatedly refused to alter this date and was therefore obligated to deliver denim as soon thereafter as was reasonably necessary to enable claimant to manufacture in accordance with the terms of the agreement. Claimant might have terminated the contract because of the Government's default in delivering material. This it did not do.

3. Inasmuch as it accepted the materials when they were delivered and proceeded with the manufacture, the question arises whether the claimant by such acceptance waived the delay in delivery.

4. The record indicates that claimant was protesting continuously, both orally and by letter, from April 29 to September 4. Its protest took the form of a reiterated request for an increase of the price to 38 cents, but this request was based at all times upon the assertion that the actual expense of manufacture had been greatly increased by the increased cost of labor and materials. It is therefore evident that at no time was it the claimant's intention to waive any claim it might have by reason of the Government's delay in delivering material.

5. It would not be a fair and equitable basis of adjustment to limit claimant to the contract price when the Government's default had



prevented it from performing during the time specified in the contract and until the cost of performance had been largely increased. That there had been such increase the Government recognized by fixing at 38 cents the unit price in all new contracts nearly a month before the first delivery of materials made it possible for the claimant to begin manufacture.

6. Where the United States fails to do what a contract requires it to do and what must be done before the contractor can begin performance on his part, the contractor is entitled to compensation to the extent of his actual damages directly caused by the default of the United States. Although in such case he may rescind the contract, his election to proceed under it is not of itself a waiver of his right to damages. (*U. S. v. Joseph Smith*, 94 U. S. 214, 24 law ed. 115; *Kelly & Kelly v. United States*, 31 Ct. Cl. 361; *Snare & Triest Co. v. United States*, 43 Ct. Cl. 364; *Cotton v. United States*, 38 Ct. Cl. 536; *Miller v. United States*, 49 Ct. Cl. 276; *Cramp v. United States*, 50 Ct. Cl. 179; *Langford v. United States*, 95 Fed. 933.)

7. Such damage as may have resulted directly from the Government's delay in delivering the material should be ascertained, and up to but not exceeding the \$4,200 claimed should be allowed to the claimant.

8. No allowance, except for delay, should be made by reason of the Government's deliveries of duck instead of denim. Claimant's damages in this particular are fixed by the amendatory contract at 3 cents per garment.

#### DISPOSITION.

This board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Lieut. Col. Carruth concurring.

MARCH 29, 1920.

**Case No. 545.**

*In re* **CLAIM OF STOWE & WOODWARD CO. (REHEARING).**

1. **JURISDICTION.**—Where, upon the suggestion of this Board, arbitrators under a formally executed contract have corrected a mistake in the document reciting their award made in accordance with the terms of a labor-dispute clause in the contract so as to allow claimant an increase in the unit price under such contract, there remains no doubt or dispute, under G. O. 103, for this Board to determine.
2. **PAYMENT IS A FUNCTION OF THE TREASURY DEPARTMENT.**—Neither this Board nor the Secretary of War has power to pay or order payment of moneys under terminated formal contracts. The power of the War Department in such matters is limited to approval and certification for payment by the Treasury Department, and such approval and certification are not ordinarily functions of this Board.
3. **COMPTROLLER OF THE TREASURY.**—The Comptroller of the Treasury has the final decision as to the disbursement of public funds before suit.
4. **CLAIM AND DECISION.**—Petition for rehearing, following an amended award of arbitrators under a formally executed contract. Held, this Board is without jurisdiction; and, furthermore, a rehearing is unnecessary, since claim merely requires voucher and certification for payment in the usual way.

Mr. Shirk writing the opinion of the Board.

1. In its opinion of January 27, 1920 (III, these decisions, p. 195), this Board recommended that the claimant request the three arbitrators to amend their memorandum of award of December 28, 1918, to include this claimant and to show that the increase is to be retroactive from September 9, 1918. The claimant has followed that recommendation and has procured the three arbitrators to make it a corrected award which recites the previous dealings between the parties and the award of December 28, 1918, and ends with the following language:

Whereas it was not discovered until after the said Stowe & Woodward Company had filed a claim with the Board of Contract Adjustment of the War Department for the sum of fifteen hundred sixty-one and 98/100 (\$1,561.98) dollars, the amount which will be coming to it under the award of the arbitrators above mentioned, that its name was not mentioned in the award; and

Whereas it appears to the arbitrators that the omission of the name of the said Stowe & Woodward Co. was purely an error; and

Whereas it was intended by the said award of December 28, 1918, to include the said Stowe & Woodward Co. and to enable them to obtain the benefits thereof:

It is further certified that the memorandum of award of December 28, 1918, heretofore set out be amended to include the Stowe & Woodward Co. and to show that the increase therein directed in the price of 14 cents per garment is to be retroactive from September 9, 1918.

2. On February 21, 1920, the Secretary of War wrote to Mr. Samuel J. Rosensohn, one of the arbitrators, as follows:

"I have for acknowledgment your letter of the 19th instant, in which you advise me that the Board of Contract Adjustment has suggested that you, Judge Mack, and Professor Ripley, who served as arbitrators under the provisions of a contract between the Government and the Stowe & Woodward Company, of Boston, in the adjustment of a dispute of its employees, should now amend your award to include this company, which had been omitted by mistake.

"For the purpose of amending their certificate of award so as to correct the clerical omission of the name of Stowe & Woodward Company, the arbitrators appointed by me, in pursuance of the provisions of the contract between the Government and the Stowe & Woodward Company, of Boston, are hereby authorized to amend the certificate of award and to advise the Board of Contract Adjustment of the War Department of their action."

3. It is our opinion that the claimant should now prepare a proper voucher for the amount due, submit it, together with "proof by affidavit of the actual amount of increased cost," to the proper officers of the War Department for certification and approval, and that a proper voucher so presented should be certified and approved by the proper officers of the War Department upon whom that duty rests. The claimant should then submit the voucher to a disbursing officer for payment.

4. The claimant now petitions this Board, in a paper which it calls a petition for a rehearing, for some kind of further action, the nature of which we do not understand. We have done all that we have power to do. Since the claimant's contract was executed in the manner prescribed by law we can not make it an "award" under the act of March 2, 1919. It already has a corrected "award" under the labor dispute clause in its contract. All that remains to be done is to prepare a proper voucher, have it certified and approved by the proper War Department officials and then present it to a disbursing officer of the Treasury for payment under its formal contract. The claimant is apparently under the misapprehension that the Secretary of War can pay or order Government moneys to be paid under formal contracts. All that the War Department or the Secretary of War have power to do is to cause to be approved and certified for payment to the Treasury Department items which, in the opinion of the War Department, the Treasury Department should pay under the terms

of the formal contract which the War Department has made. This Board has not, by delegation by General Order 103 or otherwise, greater power than the Secretary of War. The matter of approval and certification in the War Department is a matter of routine which does not come before this Board at least in the first instance. It does not appear that there is now any doubt or dispute as to the amount which should be approved and certified to. In the event that the disbursing officer to whom the voucher is presented for payment after certification and approval, and the Auditor for the War Department, refuse to honor or to pay it, the claimant has the right to appeal to the Comptroller of the Treasury, who alone has the power to make a final decision as to payment before suit. (*See opinion of this Board of Mar. 24, 1919, in the matter of Peaslee, Gaulbert Co., IV these decisions, p. 611.*)

Col. Delafield and Lieut. Lent concurring.

APRIL 6, 1920.

Case No. 197.

*In re* CLAIM OF MELVILLE-CORBETT CO.

1. **COMPULSORY ORDER FOR SEVERAL PRODUCTS—CANCELLATION OF—METHOD OF ADJUSTMENT.**—Where claimant is engaged in the manufacture of acetone, ketone, and acetic anhydride, in the production of which acetate of lime and wood alcohol are required, and which are delivered to claimant by plants producing said products for the Government under compulsory order No. 326 B/C, issued by the President through the War Industries Board under the national defense act, and claimant operates its plant under said order, and at the time of the termination thereof has on hand acetate of lime and bags containing same and certain quantities of ethyl methyl ketone, the Board will not limit its adjustment to the items claimed, but will consider in its adjustment all of the products affected by the compulsory order which claimant had on hand at the time the order was terminated.
2. **INCREASED FACILITIES.**—Where claimant installs special and increased facilities for the manufacture of acetic anhydride, an article much needed by the Government, solely in anticipation of profits therefrom there is no obligation on the part of the Government to reimburse claimant for its expense in so doing in the absence of an agreement, express or implied.
3. **CLAIM AND DECISION.**—Claim for \$114,494.28 under the act of March 2, 1919, for acetate of lime and wood alcohol, acetone, ketone, and bags. Held, agreement within the meaning of said act.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claimant filed its statement of claim, Form B, under the act of Congress approved March 2, 1919, entitled "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," asking to be reimbursed for the following products, materials, and certain expenditures it has made.

2. Claimant avers that it operated under War Department compulsory order No. 326, B. C., wherein it was to operate its plants to produce its "entire output of acetate of lime, wood alcohol, acetone, and of ketone which" said plant was "capable of producing from July 1, 1918, until December 31, 1918 (both dates inclusive)," and that "upon the termination of said compulsory order No. 326 B. C. there had been purchased to be used in the manufacture of, also there had been manufactured ready for shipment, the following property,

all of which now is in the hands of the claimant" (par. 5). Following this statement claimant set out certain quantities of products and material and other items for which it makes claims for reimbursement, namely: (a) Acetate of lime contained in 11,665 bags and certain quantities of ethyl methyl ketone, and (b) various and sundry other items designated as "small chemicals," "acetic anhydride," "galvanized iron for air pipe," "fuel oil," "fuel oil burning equipment," "rotary ball mill furnace," and "refrigerating plant" of the kind, quantity, or the amounts and of the value stated. Said claim is certified to by oath of William Melville, president, April 29, 1919.

3. As to the articles enumerated under "(a)" above, the Board finds that claimant's plant was designated under the provisions of said compulsory order 326 B. C., to produce, as stated in paragraph 2, above; and as to the items of the claim enumerated under "(b)" above, the Board finds in the records submitted herewith a question asked by the Board at a hearing had on this claim June 30, 1918, and the answer of the president made thereto under oath which substantially defines the basis upon which claimant bases its claim for reimbursement on said items.

"The CHAIRMAN. Are there any other statements you wish to make on the record to substantiate your claim here?"

"Mr. MELVILLE. In the matter of acetic anhydride *the reason I went in to the manufacture of acetic anhydride was because I attended this meeting of the price fixing of acetic anhydride, and I saw the serious needs of the Government for some one to go into the manufacture of acetic anhydride, and I took it upon myself to go into the manufacture of it.* I feel that inasmuch as the Government failed to assist me in obtaining the machinery, I have a just right to make a claim for the expense that I have been put to, inasmuch as the material is of no value to me at all. *It was done simply to assist the Government in obtaining acetic anhydride which it could not obtain at that time.*"

4. The record in this case is of considerable volume, consisting of copies of letters from the correspondence of claimant and the wood chemicals section, War Industries Board, the Bureau of Aircraft Production, the Eastman Kodak Co., and others; also War Department correspondence and the oral testimony, submitted at the hearing on June 30, 1919. A careful examination and an analysis of the entire record has been made and it does not appear that further reference thereto is material.

5. For further information pertaining to the facts, decision, and disposition of this claim, reference will be had to a decision of this Board March 29, 1920, in the matter of the Antrim Iron Co., case No. 93, et al. (Vol. IV these decisions, p. 640.)

## DECISION.

1. The Board is of the opinion that the items enumerated by the claimant as referred to in "(b)" paragraph 2, above, "Findings of fact" were expenditures made by the claimant solely in anticipation of orders which it expected to receive in the due course of business and as such expenditures they are not properly chargeable to the agreement under which complainant's plant was operating, as expressed in the provisions pertinent to compulsory order 326 B. C.

2. Claimant's president stated under oath at the hearing above referred to regarding the matter of the manufacture of acetic anhydride that the reason he went into the manufacture of these articles was because he foresaw the demand, and that he took it upon himself to manufacture it. It is obvious that this had nothing to do with the previous order under which said plant was operated. It is no doubt true that claimant's president and manager foresaw the serious need of the Government and others for this product, an increased demand having been created by reason of the World War, and that he made expenditures and incurred liabilities in preparation to manufacture acetic anhydride solely in anticipation of profits therefrom. In making this preparation the Melville-Corbett Co. anticipated profits, which it no doubt would have realized had the war continued, or it may receive them anyway in the due course of time. It voluntarily assumed the risk incident thereto, and the United States is in no way legally obligated to indemnify it against loss.

3. The Board adopts in its entirety, as applicable to that part of this claim referred to in (a), paragraph 2, "Findings of fact," above, a decision rendered March 27, 1920, in the matter of the Antrim Iron Co., Case No. 93, et al., and hereby recommends that no reimbursement be made for the items of said claims referred to in (b), paragraph 2, "Findings of fact," above, for the reasons above stated.

## DISPOSITION.

1. According to the foregoing opinion, the Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, Washington, D. C., with recommendation to the Secretary of War, as made in the case of the Antrim Iron Co., No. 93, et al., on March 29, 1920. A copy of said decision is transmitted herewith, and relief, except as therein granted, will be denied.

Col. Delafield and Mr. Van Wagoner concurring.



APRIL 14, 1920.

**Case No. 2355.**

*In re* **CLAIM OF FRED T. LEY & CO. (INC.).**

1. **MUTUAL MISTAKE—REFORMATION.**—Where there is a mutual mistake in drafting a contract, in that both the representatives of the Government and of claimant understood that the premium to be paid a surety company for a contractor's bond is a proper element of cost for which claimant should be reimbursed under the terms of a cost-plus percentage contract, the contract will be re-formed so as to express the intention of the parties in such respect.
2. **CLAIM AND DECISION.**—Claim for \$54. Class B claim filed in accordance with Purchase, Storage, and Traffic Supply Circular No. 17, 1919. Held, claimant entitled to recover.

Lieut. Col. McKesby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case comes to this Board as a class B claim, filed in accordance with P. S. & T. Supply Circular, No. 17, 1919, by Fred T. Ley & Co. (Inc.), of Springfield, Mass., claimant herein, for the sum of \$54, premium paid by claimant for a performance bond under an alleged oral agreement between the claimant and the United States. Said performance bond was entered into to insure the performance of a formally executed contract entered into on the 31st day of October, 1917, by Fred T. Ley & Co., by Harold A. Ley, president, and the United States through W. S. Price, colonel, Ordnance Department, United States Army, acting by the authority of the Secretary of War.

2. This claim was filed originally with this Board on December 30, 1919. However, the bill for the item of this claim was filed prior to June 30, 1919, with the Government disbursing officer at Springfield, Mass. The bill as first filed was approved, allowed, and paid by the Government, but same was afterwards ordered disallowed on October 24, 1919, and was refunded by the claimant at the request of the Government on November 7, 1919.

3. Under the terms of the contract the contractor was to:

“In the shortest possible time furnish the labor, material, tools, machinery, equipment, facilities and supplies, and do all things necessary for the construction and completion of the following work:

“At Hill Shops, U. S. Armory, Springfield, Mass., one (1) two-story wooden cantonment building, designed after the plans for temporary

buildings for mobilization camps and located as shown on ground plans on drawing SA-643-A, attached hereto and forming part of this contract, and do such other work as may be authorized, from time to time, in accordance with plans and specification to be furnished by the contracting officer, all subject in every detail to his supervision, direction, and instruction."

4. Contract was for emergency work for the construction of cantonment building, Hill Shops, Springfield Armory, Springfield, Mass., on Form 586, War Department, Construction Division, United States Army, commonly called "cost-plus" contracts.

5. Article II of said contract provided:

"ARTICLE II. The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(h) Such bonds, fire, public liability, employers' liability, workmen's compensation, and other insurance, as the contracting officer may approve or require, and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fees except as hereinafter provided."

6. Article IX of said contract provided:

"ART. IX. *Bond*.—The contractor shall, prior to commencing the said work, furnish a bond, with sureties satisfactory to the contracting officer, in the sum of five thousand dollars, conditioned upon its full and faithful performance of all the terms, conditions, and provisions of this contract, and upon its prompt payment of all bills for labor, material, or other service furnished to the contractor."

7. The contractor was ordered by the contracting officer to furnish a performance bond in the sum of \$5,000. Said contractor furnished said bond and paid as a premium thereon the sum of \$54. The claimant performed the contract, and in making settlement thereon presented, on November 22, 1918, to the Ordnance Department, Springfield, Mass., a bill for the premium on said performance bond.

8. The item of \$54 for premium on said performance bond was approved, allowed, and paid by the United States Government to the claimant.

9. On October 24, 1919, H. E. Spear, superintendent of purchases, Springfield Armory, Springfield, Mass., wrote the claimant, advis-

ing that the Auditor for the War Department had disallowed the payment of said item of \$54, upon the grounds of a ruling of the Comptroller of the Treasury holding that said item was not a reimbursable item under the terms of the contract, and requested the refund of said \$54. On November 7, 1919, the claimant refunded the \$54, and receipt of same was acknowledged by the said H. E. Spear on November 11, 1919.

10. It was the understanding of both the contractor and the officers of the Construction Division, United States Army, at the time of their entry into the contract herein mentioned, that the premium on the performance bond described in paragraph 9 of the contract was a reimbursable item under the terms of said contract.

11. Testimony to that effect was given by Col. Evan Shelby at the rehearing in the case of Fred T. Ley & Co., No. 150-C-760, tried with this case. It was stipulated that the testimony in that case might be considered as testimony in this case also, and that portion of Col. Shelby's testimony upon which the decision in case No. 150-C-760 is based is considered as though given in this case.

#### DECISION.

The facts and supporting testimony in this case being the same as in claim 150-C-760, the decision in the latter case is followed and adopted herewith as follows:

"1. The Comptroller of the Treasury having held that the premium on the performance bond is not a reimbursable item under Article II of the written contract entered into herein, the question before this Board is whether or not the original contract can be so reformed on the ground of a mutual mistake as to include as a reimbursable item the premium on performance bond.

"2. The reformation on the ground of a mutual mistake of a written contract solemnly entered into should be undertaken only upon the clearest evidence that such a mistake exists. (*U. S. v. Milliken*, 202 *U. S.*, 168.)

"3. In the instant case, the form of the written contract entered into was drawn up by the Construction Division of the Army, and was passed upon not only by the officer who drew the form of contract, Col. Evan Shelby, but by a committee appointed by the General Munitions Board to draft the form of contract for all emergency work, and all of these officers intended that the form of written contract should include the premium on the performance bond under Article IX as a reimbursable item, and so informed all contractors who discussed the matter with them.

"4. In a proceeding for reformation of a Government contract on account of mistake, the parol agreement is the real contract and may

be shown in evidence together with the facts constituting the mutual mistake; and the written contract, though executed in accordance with R. S. 3744, may be reformed by the parties to correspond to the real agreement. (*Akerlind v. U. S.*, 240 U. S. 531.)

"5. In the instant case the evidence clearly discloses that an oral agreement was entered into prior to the execution of the written contract, whereby the Government was to reimburse the contractor for the premium on performance bond. We are satisfied that the contract herein does not express the intent of the parties in that it does not cover this item of reimbursement for the premium on the performance bond which both parties intended to do, but by error failed to accomplish.

"6. Clearly a mutual mistake was made herein, and the law would seem clearly to be that reformation goes on the basis merely of an endeavor by mutual consent to clearly and correctly state the agreement made as of the date when it was intended to reduce it to writing. It may be said that until the Secretary of War and the claimant have succeeded in so reducing it to writing they have never actually made the contract in written form.

"7. This Board is therefore of the opinion that the original contract entered into between the United States Government and Fred T. Ley & Co. should be reformed so as to include the premium on the performance bond as a reimbursable item.

"8. This Board will therefore refer the matter to the Claims Board, Construction Division, for reformation of the original contract by a supplemental contract reforming the one heretofore made so that it will include the item for the premium on performance bond as a reimbursable item, and for final settlement of the account between claimant and the Government."

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, for action in accordance herewith.

Col. Delafield and Mr. Bowen concurring.

APRIL 15, 1920.

**Case No. 710.**

*In re* **CLAIM OF A. ZIEGLER & SONS CO.**

1. **INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.**—Where in the course of negotiations for a contract for the manufacture of O. D. webbing claimant is told over the phone "to secure the yarn, that the order would come along," and also received a letter that the formal order was in preparation, an implied contract arose to reimburse claimant for expenditures on the faith thereof, although no formal contract was subsequently issued.
2. **CHANGES IN MACHINERY.**—Where changes were made in machinery to perform prior contracts charges for such changes can not be made against a contract on which there was no production.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$7,408.88 for materials and overhead. Held, claimant entitled to recover in part.

Mr. Patterson writing the opinion of the Board.

**FINDINGS OF FACT AND DECISION.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, was filed June 7, 1919, before the Claims Board, Director of Purchase, and by it submitted to the Board of Contract Adjustment by letter of August 6, 1919, together with its certificate of July 23, 1919, "refusing to certify that an agreement was entered into with claimant company prior to November 12, 1918, within section 1 of the act of Congress, approved March 2, 1919."

2. Claimant company is a corporation organized and existing under the laws of the Commonwealth of Massachusetts and having its general offices at Boston, Mass., the business of the corporation being the manufacture of narrow fabrics and textile specialties.

3. The record is voluminous and cumbersome, made so mainly by lengthy arguments and numerous restatements in different forms of the same subject matter, which appear both in the original record and in the transcript of testimony. However, the following brief summary of the circumstances leading up to the filing of this claim will be sufficient to a clear understanding of the issues.

(a) In the latter part of the year 1917, claimant company entered into a contract, No. E. T. 329, with the Ordnance Department for supplying between December 15, 1917, and May 15, 1918, 500,000 yards of five-eighths inch 1 ounce olive drab webbing. This contract ended July 19, 1918, by complete performance.

(b) The second contract, No. E. T. 417, dated December 24, 1917, was entered into between claimant company and the Ordnance Department for supplying 250,000 yards of five-eighths inch 1 ounce olive drab webbing, to be delivered 50,000 yards in May, 100,000 yards in June, and 100,000 yards in July, 1918. This contract was never completed. Deliveries were made thereunder from time to time until in February, 1919, when there still remained an undelivered balance of approximately 70,000 yards. Duplicate claims were filed under this contract, one with the Claims Board, Director of Purchase, and one with the Board of Contract Adjustment, No. 150-C-678. The claim was allowed by the Claims Board, Director of Purchase, and its award accepted by claimant company. Claim No. 678 was therefore withdrawn from this board by claimant company by its letter of December 10, 1919.

(c) Following negotiations, by correspondence, wire, and verbal conferences, there was issued by the Ordnance Department on May 29, 1918, formal contract based on War Order 8930-5234 Eq. for 250,000 yards of five-eighths-inch 1-ounce olive drab webbing, to be delivered 25,000 yards in September, 75,000 yards in October, 75,000 yards in November, and 75,000 yards in December, 1918. This contract was submitted to claimant company for execution by letter of June 18, 1918. Claimant company have since steadfastly declined to execute the contract, complaining that the specifications therein contained were incorrect and should be altered to correspond with its interpretation of what was agreed upon during the negotiations, and the document was finally returned unsigned by claimant company on March 3, 1919.

The original claim was for the sum of \$6,710.49, but by an amendment filed with this Board January 31, 1920, relief is sought in the sum of \$7,408.88, set out as follows:

Overhead outlay previous to production, due to changes required by the Government, 250,000 yards, at 64 cents per yard-----	\$1, 600. 00
Loss in sale of yarn bought exclusively for this contract-----	4, 110. 49
Direct cash loss-----	1, 698. 39
	<hr/>
	7, 408. 88

4. The negotiations relied upon as constituting the alleged agreement commenced on May 10, 1918, by letter to claimant company from the equipment section, Ordnance Department, asking that it "submit a proposal for such quantities of five-eighths-inch 1-ounce olive drab webbing as you could deliver by November, 1918." Claimant company replied by letter of May 13, 1918, expressing its disinclination to make proposal for furnishing material, and stating:

"Our situation does not favor making more 5'' webbing for delivery by November next, for the reason that our plant is a very light construction and that our looms are light, adapted to make



the finer-count yarns, and whenever we make anything coarse like the  $\frac{5}{8}$ " webbing we have to make special provision for obtaining the yarns."

The hope was expressed that claimant company might be given "a chance at something where there would be a little more time \* \* \* say, beginning November and running for the few months thereafter." On May 21, 1918, the equipment section, Ordnance Department, replied to the above letter, stating that "this division would consider negotiating for your entire production of this material for the balance of this year if you are willing to enter a proposal on that basis. \* \* \*, but it is assumed that you would enter a proposal for delivery at the rate of 65,000 yards monthly." On May 24, 1918, claimant company sent a telegram to Maj. H. Lehman, office of Chief of Ordnance, stating: "We can furnish 250,000 yards of five-eighths-inch webbing, as now making, between September 15 and December 31, at  $7\frac{1}{2}$  cents per yard. Kindly wire decision as soon as possible." On the same date the addressee replied by letter:

"\* \* \* it is anticipated that you will be awarded a contract for 250,000 yds.  $\frac{5}{8}$ " 1 oz. O. D. webbing at  $7\frac{1}{2}$  c. per yd., for delivery between September 15th and December 31st. Formal order is now in state of preparation and will be forwarded as soon as the necessary approval has been secured."

On May 27, 1918, claimant company wrote Maj. Lehman:

"We have yours of the 24th stating that you expect to send formal order for the webbing as per our proposal, and we will therefore prepare to get this under way promptly."

In addition to the above, there is evidence of a long-distance telephone communication on or about May 24, 1918, from Carleton Richmond, then a lieutenant in the equipment section, Ordnance Department, to Alfred M. Ziegler, representing claimant company, the substance of which, the latter contends, was an acceptance of its offer by telegram from it of the same date. Mr. Ziegler testified further that Mr. Richmond "told us to secure the yarn and that the order would come along \* \* \* in due course. That was over the telephone."

Acting upon the above negotiations, and immediately upon receipt of the letter of May 24, 1918 (probably 26th or 27th following), claimant company placed an order for 12,392 pounds of yarn, invoices covering which are of record. This is as far as claimant company went in the performance of the alleged contract. There were no production or deliveries made thereunder. It is shown, finding 3 (a), that claimant's first contract was not completed until July 19, 1918,



and that it was working and making deliveries on its second contract, finding 3 (b), until as late as February, 1919.

5. Claimant company contends that it was put to great expense in making changes in its machinery, principally looms, in order to produce an article to meet the demands of the Government inspector stationed at its plants, who insisted upon an article different from that specified in the contracts. Claimant endeavored to cooperate with the inspector in every way possible, and it was with this end in view that it undertook these changes in its shop, instead of insisting that it was complying with the terms of the contracts. The testimony of the claimant, however, shows that of the more than half million yards of material furnished under all the contracts the percentage of rejection was so small as to be "not worth mentioning." The changes which resulted in the alleged losses, the testimony shows, were made "in June, July, August, and September \* \* \* and then the final changes in October," and again the looms were changed "in the summer \* \* \* in the early summer." Therefore, it will be seen that at least some of these changes were made during the performance of the first contract and the remainder while working under the second contract.

#### DECISION.

6. The negotiations above referred to and in part quoted constitute an agreement such as contemplated by the act of March 2, 1919, and the contractor is entitled to be reimbursed for such losses as it may have reasonably sustained by reason of its purchase of materials with which to enter into the performance of the contract. It is not, however, entitled to compensation for expenses incurred and losses sustained by reason of changes made in its plant or machinery to meet the demands of the Government inspectors while in the performance of other similar contracts. There could be no reason or excuse for charging any part of such expenses and losses against a contract, the performance of which the contractor had never begun upon, when such changes were made to comply with requirements of Government inspector relating to other similar contracts undergoing performance at the time.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Capt. Morgan concurring.

APRIL 17, 1920.

Case No. 504.

*In re* CLAIM OF SHERMAN M. FAIRCHILD.

1. **QUANTUM MERUIT.**—Where claimant in an attempt to develop certain camera devices for the Government prepares plans and specifications for said devices and delivers same to the Government, at the request of a duly authorized agent thereof, and thereafter the plans and specifications are used in Government work, there is an implied agreement on the part of the Government within the meaning of the act of March 2, 1919, to reimburse claimant for the reasonable value thereof.
2. **EXPERIMENTAL COSTS.**—Where negotiations between an inventor and the Government relative to camera devices do not culminate in an agreement obligating the Government to reimburse claimant for expense in connection with the development of such devices claimant is not entitled to recover expense so incurred.
3. **CLAIM AND DECISION.**—Claim for \$29,953.29 under the act of March 2, 1919, for development expenses in connection with camera devices. Held, no agreement within the meaning of said act.

Mr. Bayne writing the opinion of the Board.

This is a claim, class B, for \$29,953.29, as amended, for disbursements and services in developing devices for an aerial camera under an alleged verbal agreement with the Photographic Branch of the Bureau of Aircraft Production, made on or about August 1, 1918.

There has been a hearing on this claim.

This Board finds and decides as follows:

FINDINGS OF FACT.

1. On or about July 31, 1918, claimant came to Washington and had an interview with Capt. Theodore Williams, who was at that time assistant to Lieut. Col. John S. Sullivan, Chief of the Photographic Branch or Department of Military Aeronautics of the Bureau of Aircraft Production, in relation to certain inventions of the claimant for aerial cameras, the "in-between-the-lens" shutter, the enlarging camera, the film-spacing device, the plate pack, and the focal-plane shutter. Capt. Williams was about to take the train to New York and he and claimant agreed to take the same train and discuss these matters further on the train.

2. On the train claimant exhibited to Capt. Williams rough sketches showing his inventions and said to Williams that he thought the "in-between-the-lens" shutter would be the most valuable addi-

tion to the cameras that the Government had. After inspection, Williams stated that this invention was one of the most important the Government then had on hand; that it would overcome all of the difficulties that were common to the focal plane which was then in use. Williams showed claimant tables and all of the Government papers which had been completed up to that time relating to aerial cameras, and explained them in detail. Claimant met Williams the next morning and they went into more details about the improvements proposed by claimant. Claimant asked Williams "just what the Government would want him to do with the invention and just how the matter should be approached," to which Williams replied that the best thing for claimant to do was "to go right ahead and get this thing out as quickly as possible; to develop the 'in-between-the-lens' shutter with the various requirements, such as speed, efficiency, and method of operation, and to design the shutter."

3. Claimant asked Williams what should be done about the experimental or development work. Williams told him to obtain facilities to carry that out and proceed at once with the work of constructing the first model. Claimant suggested the factory of the International Time Recording Co., at Endicott, which Williams approved. Williams told him to go there and see what he could do toward obtaining facilities for this work; also to have the drawings made of the shutter and one of the shutters built and bring it down to Washington, and keep him advised as to how the work was getting on; also to go ahead with his other ideas of an interval mechanism, which would enable the camera to automatically take pictures at any predetermined interval, so that the operation of the camera would be entirely automatic; also to submit some drawings of claimant's enlarging camera and to consult with him about it at a later time. Claimant also showed Williams drawings of a plate mechanism which would take 12 plates that was compact and easily constructed. But Williams stated that the "in-between-the-lens" shutter was the most important and the one which claimant should start on at the earliest possible moment. Williams, however, had no authority to recommend or authorize expenditures for experimental work.

4. Subsequently, under date of August 1, 1918, Williams wrote a letter to claimant, of which the following is a copy:

"Subject: Between-the-lens shutter.

"1. It is needless to go into detail relative to the automatic shutter on which we had an interview while you were at this office. You are to be informed that your idea and scheme is very clever, and if the highest type of efficiency is attached by this method a shutter of this nature would be of great assistance to the work in aerial photography.

"2. If models could be submitted of this shutter, you would aid the Government to a great extent. It is recommended that you ex-

periment along these lines and make up a few models, so that they may be tested to see what efficiency they will give.

"3. Aerial photography is playing one of the most important parts in this war, and to produce a shutter that would give the highest degree of efficiency would be doing a great patriotic service to the Government. If a 'between-the-lens shutter' could be invented that will give the best results, it would eliminate a lot of difficulties that we are now encountering with other shutters.

"4. During your interview you mentioned many other experiments and pieces of apparatus which might be used by this department. I would advise you to get in touch with Capt. Proctor, of the Science and Research Division, and inform him what you are doing, as he takes care of most of our development work.

"5. It is trusted that you will proceed with experiments on this shutter and keep us informed from time to time as to your progress. We assure you that such spirit and ideas put into effect will be of great assistance in beating the Hun.

"By direction of Maj. Gen. Kenly."

5. Claimant immediately made arrangements with the International Time Recording Co., at Endicott, N. Y., and obtained facilities for developing the work outlines, especially the "in-between-the-lens" shutter.

6. Claimant told Williams that the work at the International Time Recording Co.'s factory could be obtained cheaper than the work at other shops in New York and would be of a much higher quality. But nothing was said between claimant and Williams as to who was ultimately to pay for this work, nor was anything said as to how claimant was going to be paid.

7. As suggested by Williams, claimant promptly proceeded to perfect the "in-between-the-lens" shutter and the other designs, and spent time and money in so doing.

8. Pursuant to the advice of Williams, in his letter of August 1, above quoted, claimant had a conference, about August 27, 1918, with Capt. Charles A. Proctor, who was then acting officer in charge of the Photographic Development Branch of the Ordnance and Instrument Department, Aircraft Production, in the absence of Capt. Herbert E. Ives, on a trip overseas. This department had charge of carrying out or authorizing experimental and development work done on materials or apparatus for aerial photography. It was the duty of Proctor, as officer in charge, to supervise everything of that kind and any work to be done, as well as appropriations to be made, had to be authenticated by his signature.

9. Proctor's recommendations went to Lieut. Col. Sullivan, who determined whether the work or material should be ordered.

10. In his conference with claimant, of August 27, 1918, Proctor examined the designs of claimant in detail and advised him that the enlarging camera and the plate pack, if developed, would probably

be of no interest to the Government; that if he could develop an "in-between-the-lens" shutter, with the required speed and efficiency, the department would recommend it for adoption if it seemed to be better than anything they had available.

11. Proctor further told claimant that he did not feel justified in authorizing the assumption of expense for the work at that time, as he did not see a sufficient probability in it; but that if claimant desired to go ahead on the work at his own expense, Proctor's department would be very glad to have him do so and would give him any help that was in their power to give him.

12. On this basis Proctor advised him to call on Capt. A. K. Chapman, in charge of the research laboratory development branch of the department at the Eastman Kodak Works in Rochester. Claimant called on Chapman and received from him sundry suggestions. Chapman sent him on December 26, 1918, a camera and divers parts belonging to the Government to help along claimant's development work.

13. Previous to his interview of August 27, 1918, claimant had written to Chapman a letter dated August 9, 1918, as to the enlarging camera, to which Chapman, signing for the Rochester development branch, had replied August 16, 1918, making sundry suggestions and closing as follows:

"2. We shall be very glad to examine the drawings of your enlarging camera. It is advised that no actual work be done upon its construction until drawings have been submitted.

"3. The drawings should be sent to the Photographic Development Branch, Ordnance and Instrument Department, Bureau of Aircraft Production, 4th St. and Missouri Avenue Northwest, Washington, D. C."

14. Claimant completed his plans and specifications for the film-spacing device and delivered the same about October 20, 1918, to Chapman, who used them in Government work. Claimant also delivered about the same time his drawings for the focal-plane shutter to Chapman, who used them also in Government work. Neither Chapman nor anyone else returned these devices to claimant or notified claimant that either was not accepted by the Government, except that Chapman took photostatic copies of claimant's drawings for the focal-plane shutter and returned the original drawings therefor to claimant.

15. Claimant completed and installed in the Government camera sent him his invention for the "in-between the lens" shutter, and on or about September 1, 1919, brought the camera with the invention installed to Washington at the request of Maj. Steichan, who was then acting officer in charge, in the absence of Lieut. Col. Sullivan. It was exhibited to Maj. Steichan, who directed it to be taken to the

Bureau of Standards, where tests were made, and afterwards to Langley field, where other tests were made with an airplane.

16. All the tests were satisfactory. The camera with the device was left in the Government possession about a week and was then directed by Maj. Steichan to be delivered back to claimant, saying:

"The camera is not a radical enough departure from what we have got. There is going to be some question of the payment of this camera, and Mr. Fairchild must take it back with him."

It was accordingly handed back to claimant, who produced it at the trial.

17. On April 2, 1919, claimant called on Lieut. Col. Sullivan, stated he had paid for the work, and wished to know how he should receive his compensation. Sullivan replied he knew of the work and thought some way should be devised for paying claimant, but beyond suggesting proceedings under the Dent Act, which he thought provided for claimants who had no contracts, Sullivan reached no definite conclusion and made no agreement. Sullivan knew of no conversation of claimant with Williams nor what arrangement had been made by the Development Section. The "in-between-the-lens" invention had not then, April, 1919, been completed, and the practice was for the division not to purchase anything until it had been completed and tested.

18. Williams, though present at the hearing, was not called as a witness by claimant nor by the Government.

#### DECISION.

1. Claimant, having completed and delivered, about October 20, 1918, the plans and specifications of the device invented by him, known as the "film-spacing" device and the drawings of the "focal-plane" shutter device, also invented by him, to Capt. Chapman, acting for the Government, who accepted and used the former and photostatic copies of the latter in Government work, an agreement is thereby implied by the Government to pay claimant the reasonable value of said devices in the absence of any evidence showing return of said documents so used to claimant or notice that the Government would not keep them.

2. There is no evidence of any agreement between Capt. Williams and claimant whereby Williams, acting for the Government, agreed to pay claimant for his services and expenses in designing and making a model of an "in-between-the-lens" shutter, nor is there any evidence of Williams's authority to make such an agreement.

3. There is no evidence of any agreement between claimant and Capt. Proctor, of the Science and Research Section, in August, 1918, or at any other time, whereby the Government agreed to pay claimant

for his services and expenses in developing the "in-between-the-lens" shutter invention.

4. The Government did not accept and is not obligated to pay for said invention of the "in-between-the-lens" shutter.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Maj. Hill concurring.



APRIL 26, 1920.

Case No. 1679.

*In re* CLAIM OF SEABOARD CHEMICAL CO.

1. **JURISDICTION—ACT OF MARCH 2, 1919.**—Where a claim is not presented prior to June 30, 1919, this Board can grant no relief under the act of March 2, 1919.
2. **JURISDICTION TO AMEND QUASI CONTRACTS.**—A quasi contract is not capable of amendment, and therefore it is not within the power of the Secretary of War, or this Board, to authorize a settlement contract in order to compensate claimant for its loss in the performance of such a contract.
3. **GENERAL ORDERS, No. 103.**—Under the provisions of G. O. 103 it is the duty of this Board to advise the Secretary of War as to his rights and obligations where property is taken under the national defense act and to suggest what steps should be taken for the enforcement of his rights or the discharge of his obligations in those cases not handled under that act by the War Department Board of Appraisers.
4. **JURISDICTION UNDER ACT OF JUNE 3, 1916.**—The fact that this Board may grant relief under the act of March 2, 1919, where the contract falls within the limitations of that act in cases involving compulsory orders under the national defense act of June 3, 1916, issued prior to November 12, 1918, where the claim is presented prior to June 30, 1919, does not exclude this Board from granting relief to claimant without resorting to the act of March 2, 1919, in cases where the claim was not presented as required within the time limit of said act and from giving relief under the act of June 3, 1916.
5. **FIFTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES—COMPULSORY ORDERS—TAKING COMPENSATION.**—Where a compulsory order under section 120 of the act of June 3, 1916, requires a manufacturer to manufacture wood alcohol, and as a direct result of such order he suffers a loss, there is a taking within the fifth amendment to the Constitution of the United States for which compensation must be made.
6. **DUTY OF SECRETARY OF WAR UNDER ACT OF JUNE 3, 1916.**—Where the President of the United States under the act of June 3, 1916, issues compulsory orders for War Department purposes through the Secretary of War, which are complied with, the duty is imposed on the Secretary of War to make fair and just compensation for the property so taken.
7. **CONSTRUCTION OF THE ACT OF JUNE 3, 1916.**—Where it is provided in the act of June 3, 1916, that fair and just compensation shall be made for private property taken under the act no narrow construction will be given to those words which describe the property for which compensation is to be made, because the general intent of Congress to make compensation for all property taken under the act is clear, and any construction which does not give the words such a meaning would construe the act as unconstitutional.

- 8 **DEFECT SUPPLIED.**—Where an act provides for the taking of private property, and where, through the omission to provide for the making of compensation, or where, through the use of inapt words, the provision for compensation appears not to be as broad as that authorizing the taking, the defect will be supplied.
9. **CLAIM AND DECISION.**—Claim for \$9,659.65 under G. O. 103 for loss in the operation of plant for the manufacture of wood alcohol. Held, claimant entitled to an adjustment.

Mr. Henry writing the opinion of the Board.

#### FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim was made under the act of March 2, 1919, but should have been brought under G. O. 103, War Department, November 6, 1918. The amount of the claim is \$9,659.65 by reason of an agreement alleged to have been entered into between claimant and the United States.

2. The claim, as filed, is irregular in form, and consists of an affidavit from the claimant asserting certain losses by reason of compliance with Government compulsory order under date of December 24, 1917. The letter transmitting the claim to this Board bears date of July 1, 1919. Claimant's affidavit setting forth the items of its claim is dated July 11, 1919, and the record of this Board shows that the papers were not received until July 14, 1919. It appears from the investigation of this claim that a form letter under date of April 22, 1919, was forwarded to all chemical producers affected by the compulsory order in question, by the Board of Contract Adjustment, requesting certain information as to wood alcohol, acetone, and ketone, which the claimant may have had on hand as of the date of the cancellation of compulsory order No. 326 B/C. No response was received to this communication, and on May 17, 1919, a duplicate letter was sent to it. No acknowledgment was received to this letter until July 14, 1919, the date upon which the claimant filed its present claim.

3. The claim is itemized as follows:

(a) Loss in operation of plant (Exhibit A) .....	\$568. 89
(b) Depreciation charges of plant for month of January, 1918 (Exhibit B) .....	1, 341. 45
(c) Loss from interference with business of company .....	7, 749. 31
Total .....	9, 659. 65

Said losses are alleged to have been sustained by reason of compulsory order of December 24, 1917.

4. A letter from the claimant company under date of March 20, 1920, and in response to an inquiry from this Board as to whether or

not the claimant had presented this claim to any other board or bureau of the War Department, furnishes the following information:

*"This claim has never been presented to any other board or bureau of the War Department or any other department of the U. S. Government. It is the only claim ever placed in any way by this company."*

#### DECISION.

1. No relief can be granted in this case under the act of March 2, 1919, because the claim was not presented before June 30, 1919, as required by the act.

2. The claim is based upon a compulsory order issued under section 120 of the national defense act of June 3, 1916, and is predicated on a quasi contractual obligation to make reimbursement for loss caused by the issue of the order. By its nature, a quasi contract is not capable of amendment. Therefore it is not within the power of the Secretary of War, and *a fortiori* of this Board, to authorize a settlement contract to be entered into to compensate claimant for its loss.

3. But section 120 of the national defense act of June 3, 1916, provides:

*"The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material or as rental for use of any manufacturing plant while used by the United States shall be fair and just."*

The act shows an unmistakable intention that the Government should make compensation for the property taken.

4. It is the duty of the President of the United States under the act to make compensation. This duty he delegated to the Secretary of War for property taken by the War Department. The Secretary of War appointed the Board of Appraisers to fix the prices of articles taken and to make awards, and such awards are paid by the disbursing officers of the War Department.

5. It happened, however, that a class of cases arose which the Board of Appraisers felt that it should not handle. A large number of compulsory orders were issued requiring manufacturers to manufacture toluol, acetate of lime, and other chemicals. The Board of Appraisers fixed the price to be paid for the finished product, and the manufacturers were paid. But at the time the compulsory orders were canceled the factories had materials in process which the Government did not want. There was no question but what compensation should be made for the loss on such materials, and the only question was as to the best way to handle the situation. By a memorandum dated April 17, 1919, from the War Department Claims Board to the chairman of this Board, this Board was directed to take jurisdiction of the toluol, acetate of lime, and similar cases, in order that complete

relief might be given. This memorandum was the result of a conference between Lieut. Col. Christopher B. Garnett, at that time the chairman of this Board and the chairman of the War Department Board of Appraisers, and Col. Herbert H. Lehman, Assistant Director of Purchase, Storage, and Traffic, and a member of the War Department Claims Board. The latter board, by authority of the Secretary of War, has the function of determining in any doubtful case coming under the act of March 2, 1919, what board or agency of the War Department should take jurisdiction.

6. In the toluol and acetate of lime cases, this Board, although recognizing the nature of the obligation to be quasi contractual, gave relief under the act of March 2, 1919. (See the decisions of this Board in the case of Pittsburgh By-Product Co., p. 767, Vol. I, and the Acetate of Lime cases, p. 189, Vol. I.) The decision of the Board amounts to a holding that the act of March 2, 1919, in authorizing the Secretary of War to adjust "any agreement, express or implied," \* \* \* when "such agreement has not been executed in the manner prescribed by law" includes quasi contracts. Obviously, a quasi contractual agreement has not been "executed."

7. A holding that relief may be granted under the act of March 2, 1919, where the contract falls within the time limitations of that act, the compulsory order being issued before November 12, 1918, and the claim being presented before June 30, 1918, does not exclude relief from being given without resorting to that act, where, as in the case before us, it can not be brought under the act because the claim was not presented in time. Relief may be granted under the national-defense act of June 3, 1916.

8. G. O. 103 of the War Department of November 6, 1918, provides:

"5. It shall be the duty of the Board to hear and determine all claims, doubts, or disputes, including all questions of performance or nonperformance, which may arise under any contract made by the War Department."

It is believed that it is the duty of this Board, under such provision, to advise the Secretary of War what are his rights and obligations where property is taken under the national-defense act and as his agent to direct what steps should be taken for the enforcement of his rights or the discharge of his obligations, whenever, as in the case before us, the matter is not handled by the War Department Board of Appraisers.

9. The right to compensation for a taking of private property can not be limited by the remedy afforded by such awards as may have been made by the Board of Appraisers under the act of June 3, 1916, or may be made by the Board of Contract Adjustment under the act of March 2, 1919. Where a taking can not be compensated for in either of the above ways, it must be done in some other way.

10. It may be questioned whether there was a "taking" in this case, where the United States did not want and did not take title or possession of the materials. It is said in 15 Cyc. 653, citing *Trenton Water Power Co.*, 36 N. J. L. 335, and other cases:

"The entire or partial destruction of private property for public use is an appropriation of it within the meaning of the Constitution."

On the same page of Cyc., citing *Foster v. Scott*, 136 N. J. 577, it is said:

"Any destruction, restriction, or interruption of the common and necessary use and enjoyment of property, in a lawful manner, may constitute a taking."

11. That, it is believed, gives an accurate statement of what constitutes a "taking" within the meaning of the fifth amendment to the Constitution of the United States. It does not, of course, define what takings entitle the owner to compensation. There are two, and only two, powers under which our Federal Government may take private property without compensation, and they are the police power and the power to tax. The power under which the Government takes private property with the duty to make compensation is called "eminent domain." Taking under the national-defense act comes within its definition. In *Jones v. Walker*, 13 Fed Cas. 7507, it is said:

"The right belonging to society or to the sovereign of disposing, in cases of necessity and for the *public safety*, of all the wealth contained in the state is called 'eminent domain.'"

Dillon, *Municipal Corporations*, fourth edition, section 584, defines eminent domain as—

"The right of every Government to appropriate, otherwise than by taxation and its police authority, private property for public use."

12. It may be suggested that the words of section 120 of the national defense act quoted in paragraph 3 above are not broad enough to include the making of compensation for products or materials in process. The words might be construed to provide compensation only for products or materials which have actually been delivered, accepted, or used by the United States. But is that a proper construction? The act provides that the compensation "shall be fair and just." When a compulsory order requires a factory to manufacture a certain product, would it be fair and just to compensate it only by a fair price for the finished product and to allow it to pocket its own loss on unfinished products which it was required to make under heavy penalties? To go a little further, let us suppose the manufacturer has been compelled to rearrange his factory, to get together an organization at great expense and to acquire raw materials, but is stopped before he is able to turn out any finished product. Would it be fair and just compensation to give him nothing for the

loss suffered, which may run into many thousands of dollars? It can not be presumed that Congress intended any such result. The general intent of the act is clear. Congress intended to have fair and just compensation made for the property taken or for losses resulting directly from the issue of compulsory orders under the act. The words of the act must be construed in the light of their general intent. In that light no narrow construction should be adopted. It is believed, therefore, that the act is properly construed to allow compensation to be made in such a case as that before us.

13. This view is also greatly strengthened by other considerations: First, where an act provides for a right and a remedy it is presumed that the remedy is as broad as the right. Where Congress has provided for a compulsory taking and has in the same act provided that fair and just compensation shall be made for such taking, it is to be presumed that it was intended that the compensation should be adequate and commensurate with the loss suffered by the taking. It is not to be presumed that Congress intended to afford a remedy in some cases and not in others, to some persons and not to others. It could not have been intended that some were to receive compensation and others were to go without; or that in some cases the President or those delegated by him to exercise his powers under the act could make fair and just compensation, and that in others the sufferers, if they had any remedy, would be required to resort to the courts.

14. Again, it is not to be presumed that an act is unconstitutional.

The fifth amendment to the Constitution of the United States reads:

“Nor shall private property be taken for public use without just compensation.”

Statutes providing for the taking of private property without compensation being provided for in the statute, have been held void. On the other hand, the want of an express provision for compensation in a special statute is not necessarily fatal. If a general law is in existence which provides for compensation, it is sufficient. Also, it has been held that statutes may be read with the Constitution. (15 Cyc. 642; *Harrisburg v. Crangle*, 3 Watts & S. (Penn.), p. 460.)

“An act of Parliament will not be construed as interfering with or injuring personal rights without compensation, unless no other construction is possible.” (*Atty. Gen. v. Horner*, 14 Q. B. D., p. 257.)

In the case before us the act should not be construed as void because unconstitutional. It admittedly provides for compensation in some cases, and the only doubt is as to whether it does in all cases coming within the operation of the act. If it does not provide a remedy in all cases it is unconstitutional and void, unless the defect can be supplied.



15. But it has been held that statutes may be read with the Constitution where no provision is made for compensation. Certainly where, as in this case, a provision is made it is legitimate to construe it in the light of the Constitution, and with the constitutional provision incorporated therein. Where there is no remedy provided it has been held that it will be supplied. So even if one should insist on holding that the words of the provision in the act of June 3, 1916, do not include the making of compensation except for products or materials actually accepted and used by the United States, and that the act is thereby defective in providing only a partial remedy, a complete remedy should be supplied.

16. It frequently happens that a statute uses inapt words, and such may be the case here; but if so, we have the following principles of law which we believe are controlling as to their meaning, and on the question of whether compensation should be made for a loss directly caused by a compulsory order:

(a) A statute should be construed in the light of its general intent.

(b) Where a statute creates a right and a remedy, it is presumed that the remedy is as broad as the right.

(c) No statute should be construed as unconstitutional unless no other construction is possible.

(d) Even if the words clearly provide no remedy, or an inadequate one, where the remedy is guaranteed by the Constitution, the defect will be supplied.

17. Our conclusions, therefore, are as follows:

(a) The loss suffered by claimant as a result of the compulsory order served upon it under the national defense act, for which it has not been compensated by having received the sums to which it was entitled for its finished product or for other materials taken over by the United States, is a taking within the meaning of the fifth amendment to the Constitution of the United States, for which compensation must be made.

(b) Section 120 of the national-defense act provides for compensation in a case such as this.

(c) The President of the United States has delegated to the Secretary of War the right to issue compulsory or commandeering orders under the national defense act and the duty to make compensation therefor.

(d) The Secretary of War has appointed the Board of Contract Adjustment to "hear and determine all claims, doubts, or disputes, including all questions of performance which may arise under any contract made by the War Department."

(e) The claim under consideration is within the terms of G. O. 103, War Department, November 6, 1918, as just quoted, and unless



the case is one which the Board of Appraisers is specifically required to determine, it falls properly within the province of this Board.

(f) The case, it is believed, is not one to be determined by the Board of Appraisers, and therefore we hold that it is within our jurisdiction to grant relief under section 120 of the act of June 3, 1916.

18. The facts of this case are similar to those in the Antrim Iron & Steel Co. case, No. 93, and the principles announced in the decision of that case are applicable here. There is no dispute as to the issue of the compulsory order and compliance therewith. The only questions remaining are, therefore, as to whether claimant is entitled to recover for those particular items claimed, which are matters which can be determined in accordance with the established rules when the award is made.

#### DISPOSITION.

The award section of this Board will make an award similar to those made by the Board of Appraisers under the act of June 3, 1916, and submit such award to the proper disbursing officer for payment in a manner similar to the procedure of the Board of Appraisers. In arriving at the award the supply circulars of the War Department should be employed, in order that the award may be based on the same principles as awards in similar cases which have been made under the act of March 2, 1919.

Col. Delafield and Mr. Richard W. Smith concurring.

APRIL 28, 1920.

Case No. 476.

*In re* CLAIM OF JACOB ELISHEWITZ CO.

ON APPEAL BEFORE THE SECRETARY OF WAR.

1. **OVERSEAS CAPS.**—This claim was decided by the Board of Contract Adjustment October 21, 1919, relief being denied. On appeal to the Secretary of War, the decision of the Board denying relief was remanded to the Board for further proceedings. (See Vol. 2, p. 168.)

This case comes to me on appeal from a decision of the Board of Contract Adjustment denying claimant relief.

Upon consideration of the record presented it is directed that further proceedings be had in accordance with the attached recommendation of the special advisers.

BENEDICT CROWELL,  
*Assistant Secretary of War, Director of Munitions.*

MEMORANDUM FOR THE SECRETARY OF WAR.

In this case the claimant in September, 1918, filed a bid for the manufacture of overseas caps. A few days after the bids were opened he called to inquire as to what action had been taken on his bid. The claimant testified that in his interview with the negotiating officer, Mr. A. M. Wolf, he was told by the latter that he had been recommended for an award, and this testimony has not been contradicted by Mr. Wolf.

Claimant had several prior contracts. When he put in a bid, which would be passed on to the contracting officer or to the Board of Contract Review, he would inquire of Mr. Wolf, and would be told by him that the contract had been awarded or "recommended." On all prior occasions formal contract followed. Mr. Wolf on these prior occasions advised (if he did not direct) him to secure materials while he could. That he did not repeat this admonition at this time is not very material. The claimant might reasonably infer that the usual course was to be followed.

Capt. Ridge, it is true, makes affidavit that while he told the claimant that he had been recommended for an award for overseas caps, he cautioned him not to proceed with production until formal contract had been received.

Capt. Ridge was not present at the hearing, and claimant had no opportunity to cross-examine. Furthermore, Capt. Ridge states that this conversation occurred on or about November 1, while Mr. Wolf had advised claimant of the recommendation for an award about a month previously, and goods, on which claim is based in part, had been purchased far in advance of the alleged conversation with Capt. Ridge.

The Board of Contract Adjustment in its examination and in its decisions lays great stress (1) on the difference between an award and a recommendation for an award, and (2) on the authority of Mr. Wolf to award a contract.

It appears to us that these differences are of no moment so long as it can be shown by the claimant that he acted in good faith and made expenditures, etc., on the authority of an officer of the Government.

Ordinarily, contractors had no means of judging of the actual formal authority of the officers with whom they negotiated; they had every reason to believe, particularly in the case where prior contracts had been issued, that the officer with whom they negotiated actually had authority to bind the Government.

This seems to be one of those cases Congress had in mind where a man of reasonable prudence was being misled (unconsciously by the officer, of course) as to the interior mechanism of the bureau. There was no reason for him to believe that Mr. Wolf's authority to bind the Government was less, in this instance, than in the case of previous contracts which were awarded to him, nor could he differentiate between an award and a recommendation of an award.

It would appear to us, therefore, that unless Capt. Ridge's testimony materially alters the situation it should be held that an agreement had been entered into between the Government and the claimant.

It is recommended that this case be returned to the Board of Contract Adjustment by the secretary, with instructions to take the testimony of Capt. Ridge, especially as to the date of the interview to which he refers, and in which it is alleged that he cautioned the claimant not to proceed with production until a formal contract had been received. Unless it is shown that Capt. Ridge's instructions were issued to the claimant prior to the time of his purchase of materials, and prior to the incurring of expenditures by him in good faith in connection with production under the contract, it is recommended that the Board be directed to find that an agreement was entered into between the claimant and the contractor and to proceed with an adjustment of the claim in the usual manner.

HERBERT H. LEHMAN,  
E. HENRY LACOMBE,

*Special Advisers to the Secretary of War.*

## MEMORANDUM FOR THE SECRETARY OF WAR.

The controlling facts in connection with this claim seem to me to be that all previous contracts of claimant were *emergency contracts* as to which Mr. Wolf, the Government representative with whom claimant had his dealings in these matters, made it a practice to tell claimant that a written contract would follow his recommendation, and that claimant should immediately purchase his materials in order not to delay deliveries.

Such having been the practice, claimant was asked to bid for a contract which was not an emergency contract, but, as admitted by Mr. Wolf, *claimant was never told* that this was not an emergency contract, or that bids were to be handled or awarded in any different manner, or goods to be purchased with any less promptness than under previous contracts. Mr. Elishewitz declines to state positively whether he was told that he had been awarded a contract or recommended for a contract, but does say that the two meant the same thing to him in connection with his negotiations with Mr. Wolf in regard to cap contracts, and that on returning to his factory after Mr. Wolf had told him he had been awarded or recommended for a contract, and to buy his materials, he informed his father, the proprietor of the business, that they had been awarded a contract.

There seems to be no reason to believe that any different language was used on this occasion from what had been used on previous occasions in informing claimant that he had been recommended for emergency contracts, and the record tends to indicate that claimant acted on this information in exactly the same manner that he had previously acted with Government approval in connection with previous contracts.

Mr. Elishewitz testifies that on this occasion, as well as on previous occasions, he was also told to buy materials. Mr. Wolf does not contradict this, but says that if he advised claimant on this occasion to buy anything it was only to buy sateen (the principal item of petitioner's claim for materials), and that he does not remember having advised claimant to buy materials on this occasion.

I agree with the remarks of Judge Lacombe and Mr. Lehman regarding the effect of the affidavit of Capt. Ridge, and in general as to Mr. Wolf being such an authorized officer or agent as is contemplated by the Dent Act. I do not think that the foregoing memorandum is intended to be understood as indicating that a fundamental distinction is not to be drawn between notice that a contract has been *awarded* and notice that such award has been *recommended*. In many cases the distinction is a vital one and can not be disregarded by a contractor except at his peril. In this case, however, I reach the conclusion from the record that whether claimant

was told he had been recommended for a contract or awarded a contract, he was told the very same thing which, as to previous contracts, he had been told would result in a formal contract being issued, and which, as a part of the Government's course of business, he had been requested to treat as sufficient justification for the purchase of materials.

I therefore concur in the recommendation that the Board of Contract Adjustment be instructed to take the testimony of Capt. Ridge by deposition, or otherwise, in such a manner as to afford claimant opportunity of cross-examination, and that unless it shall be shown that Capt. Ridge's instructions were issued to the claimant before he purchased materials or otherwise incurred expenditures in good faith in connection with production under the contract, an agreement should be established that the United States will hold claimant harmless as to reasonable and proper expenditures incurred by him in good faith in connection with the contract for which claimant had been recommended.

R. C. GOODALE,  
*Special Adviser.*

MAY 1, 1920.

Case No. 576.

*In re* CLAIM OF GRATON & KNIGHT MANUFACTURING CO.

1. **MATERIALS.**—Where claimant had manufactured bark-tanned leather, not a commercial product, for Army shoes at the request of the Government and with the understanding that the Government would take off of claimant's hands all such leather which claimant was unable to sell to shoe manufacturers, there is an agreement within the meaning of the act of March 2, 1919, whereby the Government is under obligation to compensate claimant for its loss on all such leather manufactured by it conforming to Government specifications for which claimant has been unable to find a purchaser.
2. **SAME.**—Where, under the circumstances stated in Syllabus I, claimant had manufactured bark-tanned leather in excess of the amount for which it had contracts and when requested by the Government to advise it the amount of such leather on hand claimant erroneously advised the Government that it had none such on hand, which error claimant afterwards discovered and of which it advised the Government, such circumstances do not preclude claimant from recovery under the facts of this case.
3. **CLAIM AND DECISION.**—Claim for \$8,333.68 under the act of March 2, 1919, for loss on bark-tanned leather. Held, claimant entitled to recover.

Mr. Bayne writing the opinion of the Board.

This is a claim, class B, under the Dent Act, for \$8,333.68, which claimant alleges is the loss sustained by it on the manufacture of bark-tanned upper leather for shoes, undertaken at the request of the Hide and Leather Control Branch of the Quartermaster Department. Claimant estimates the loss to be 50 per cent of the value of 24,214 $\frac{3}{4}$  square feet of bark-tanned leather left on its hands.

There has been a hearing on this claim.

The Board finds and decides as follows:

FINDINGS OF FACT.

1. At a meeting at Boston, held April 2, 1918, between Mr. Frederick A. Vogel, Chief of the Upper Leather Section of the Hide and Leather Control Branch of the Quartermaster Department at Washington, D. C., and the tanners of the country selected and approved by the Government for the manufacture of Army shoe leather, Mr. Vogel stated that bark-tanned upper leather must be produced in large quantities to supply shoes for the Army in France, and that as this bark-tanned leather was not a commercial product, the Hide and Leather Control Branch felt that if they asked the tanners to make this leather "they should practically guarantee them a place to put

it, and if the tanners did go ahead they would be absolutely certain that a market would be secured."

2. At a meeting between the tanners and Mr. Vogel, held April 4, 1918, at Chicago for the convenience of the western tanners, similar representations were made by Mr. Vogel to the tanners, and Mr. Vogel further stated that as long as the Government awarded sufficient shoe contracts to absorb all of such leather which was manufactured, the tanners would have a ready market for the leather manufactured according to the Government standards.

3. The proceedings taken at these meetings were promulgated by bulletin, by letters to the individual tanners, by the trade papers generally circulated among the tanners, and by the Tanner's Council, formed for the purpose of aiding the Government in its communications and business with the tanners, so that all of the tanners interested were informed of such proceedings.

4. At a conference held May 2, 1918, between Mr. John W. Craddock, Chief of the Shoes, Leather, and Rubber Goods Department, and Mr. Vogel and others, of the Hide and Leather Control Branch, Mr. Craddock authorized the assurance to be given to the tanners that if the tanners had any surplus of this leather due to a change in program or other unforeseen incident the Government would take the surplus leather.

5. By letter dated May 4, 1918, signed "Hide and Leather Control Branch, C. F. C. Stout, Chairman, by F. A. Vogel, Chief of Leather Section," to Mr. Craddock, the understanding of said conference of May 2 was confirmed. This letter stated that pursuant to the conclusions then reached the branch was instructing the tanners to keep on producing bark-tanned bends in sufficient amounts to take care of 2,000,000 pairs of shoes, and that these bends would be taken by the Government and made into shoes, irrespective of whether the Government changed the specifications at some time prior to the delivery of the leather, so as to encourage the tanners to make the leather; that it was not a commercial article; and that no tanner would undertake to make it unless he had an assured market for the same.

6. On May 13, 1918, the branch, acting through Mr. Vogel, Chief of the Upper Leather Section, sent a form letter to all the tanners, stating that the Government was very insistent on increasing the production of bark leather and requesting the tanners to give the figures of their production, adding as follows:

"We have gotten an expression from the Procurement Division of this department that all bark leather which we will instruct you to make will be taken, even if subsequently the General Staff should change their specifications on this trench shoe. We do this because we realize that we do not want a tanner to make up any leather at the instigation of the Government and then have the same left on his hands."



7. By letter dated May 23, 1918, Mr. Craddock, quoting the Assistant to the Acting Quartermaster General, confirmed in substance the arrangement already made with reference to the protection of the tanners of bark-tanned leather.

8. These representations on the part of the Government were severally communicated to claimant, among other tanners, and upon the faith thereof claimant entered upon the manufacture of bark-tanned leather and produced 245,631 square feet thereof, according to the Government specifications therefor, except as hereinafter stated, samples of which had been sent to the branch and approved by it. Of this amount claimant had orders for 225,000 square feet and had left on its hands 24,214 square feet which it was unable to sell.

9. On June 20, 1918, the tanners generally, including claimant, were notified not to produce, until further notice, any more of this bark-tanned leather than their existing contracts required, by reason of changes in the Army program for shoes. This notice was confirmed subsequently by form letter to all the tanners, dated August 31, 1918. The notice was not intended to apply to leather in process of manufacture, which could not be interrupted without destroying the leather.

10. Claimant had first notified the branch that it had no more of this bark-tanned leather than it had orders for, but subsequently discovered this was an error by reason of the fact that the shoe manufacturer had returned to claimant more leather than he needed for his contract and that in addition claimant had underestimated the amount of leather that it had in process at the time it made its report to the branch, so that in fact claimant, instead of having no surplus leather, as it had reported to the branch, found later that in fact it had 24,214 square feet of this bark-tanned leather on which it is claiming the loss stated in this claim.

11. By reason of this unintentional error on the part of claimant it was not included in the list of bark-tanned upper leather manufacturers who were named to the shoe manufacturers as the tanners from whom, and from whom alone, the shoe manufacturers could purchase leather for their shoe contracts. Neither claimant nor the branch could thereafter find a purchaser for this leather that claimant had on hand, mainly, however, because the amount of leather was not sufficient to attract orders from the manufacturers, who found it more convenient, satisfactory, and profitable to purchase leather in large quantities.

12. The leather in question has been inspected on behalf and at the instance of the Quartermaster Department, and on such inspection it was found that approximately 6,000 square feet of it did not conform to the Government specifications, but that apparently the residue did.

13. The leather, not being a commercial article, could not be sold without considerable expense in changing it for civilian trade, which expense claimant estimates to be one-half the value of the leather, amounting in this case to the claim of \$8,333.68. Claimant therefore asks to be reimbursed this amount and to be allowed to keep the leather.

14. While claimant was probably at fault in not making a more accurate estimate of what surplus leather it would have on hand in time to be included in the Government list of tanners having such surplus for the shoe manufacturers, yet, as claimant did not put in soak any hides after June 20, 1918, and as the Government awarded more contracts for shoes requiring more bark-tanned leather than was actually reported to it, and as claimant's surplus was not large, there is no evidence to show why the Government did not make more effort to provide for claimant's surplus, especially as, in its letter to claimant dated September 16, 1918, the branch directed claimant not to dispose of the leather without permission from that office.

#### DECISION.

1. Claimant having undertaken at the request of the Government, acting through Mr. Frederick A. Vogel, Chief Upper Leather Section of the Hide and Leather Control Branch of the Quartermaster Department at Washington, D. C., prior to and on or about May 13, 1918, to manufacture bark-tanned upper leather for Army shoes in consideration of the Government's promise to take off claimant's hands all such bark-tanned upper leather for which claimant could not find a purchaser, or to procure purchasers therefor, and claimant having thereafter at the request of the branch discontinued such manufacture, and having left on its hands such leather which it was unable to sell, and having so notified said branch,

An agreement is thereby implied between the Government and claimant, whereby the Government agreed to reimburse claimant for the loss necessarily and reasonably sustained by it on account of so much of said bark-tanned upper leather so left on its hands as was made according to Government specifications which it was unable to sell.

2. Claimant should be reimbursed accordingly.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Office of the Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Maj. Hill concurring.

MAY 1, 1920.

Case No. 2498.

*In re* CLAIM OF LANGENBERG BROS. GRAIN & HAY CO.

1. CLAIM AND DECISION.—Claim under G. O. 103 for \$72.41 balance due on carload of hay and excess freight charges due to clerical misprision in copying or setting down weight entries. Held, claimant entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with G. O. No. 103, War Department, 1918, and is for \$72.41 under the following circumstances:

2. The claimant was furnishing hay to the Government under a formal purchase order No. 02265, dated October 17, 1918.

3. Under this order there was shipped to Camp Bowie, Tex., Big Four car 4610 containing hay.

4. On this car there was an alleged shortage in the net weight which shortage is the basis for this claim and is set out in the claim as follows:

Contained.....	23, 500 lbs.	
We received payment.....	18, 500 lbs.	
		<hr/>
Shortage.....	5, 000 lbs. at \$25 ton....	\$62.50
Excess freight charged on 3,500 lbs. at 27½c.....		9. 91
		<hr/>
		72. 41

5. This claim could not be disposed of by mutual agreement between the contractor and the zone purchasing officer, the Government officers taking the position that they could not legally make any correction on weight and claimant thereupon submitted claim to the Board of Contract Adjustment under G. O. No. 103.

6. The affidavits show that there was undoubtedly a clerical error made either in taking off or in setting down the tare weight on the car.

	Pounds.
Shipper's affidavit loading weight.....	23,560
Railroad company's weight obtained at Camp Bowie:	Pounds.
Gross.....	56, 500
Tare.....	32, 900
	<hr/>
Net.....	23. 600

Government weigher's weight as reported at Camp Bowie:	Pounds.
Gross.....	56,500
Tare.....	38,000
	<hr/>
Net.....	Pounds. 18,500

7. Letter dated July 25, 1919, from superintendent car service, Big Four Railway, shows that the correct tare weight on this car on June 2, 1916, was 32,900 pounds.

8. The record shows that in the settlement excess freight on 3,500 pounds, at 27½ cents per hundred and war tax, also reconsignment charges and war tax at Gainesville, Tex., were deducted from the amount due to the contractor.

#### DECISION.

1. From the evidence it is clear that an error was made by the Corporal, Quartermaster Corps, either in taking off the tare weight from the car or in setting same down on his report and that said tare weight should have read 33,000 instead of 38,000.

2. It is also clear from the evidence that on account of this error shipper was charged with freight on 3,500 pounds, at 27½ cents per hundred when car was reconsigned.

3. It is, therefore, the opinion of this Board that the claimant is entitled to payment at the contract price of \$25 per ton on 5,000 pounds of hay and to the excess freight charged on the 3,500 pounds, at 27½ cents per hundred.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for action in accordance therewith.

Col. Delafield and Mr. Averill concurring.

MAY 1, 1920.

**Case No. 1525.**

*In re* **CLAIM OF TURNER & MOORE MANUFACTURING CO.**

- 1. DEFECTIVE CASTINGS FURNISHED BY THE GOVERNMENT—CONTRACTOR'S RIGHTS.**—Where the United States Government under a proxy-signed contract agreed to furnish claimant with rough castings to be used in the manufacture of hubs for artillery wheels an obligation arose under the act of March 2, 1919, on the part of the Government to reimburse claimant for such reasonable expense as was incurred by the claimant as a result of the Government's failure to furnish castings reasonably free from defects.
- 2. CLAIM AND DECISION.**—This claim for \$925.08 arises under the act of March 2, 1919, and is presented upon the theory that the Government is obligated to reimburse claimant for loss sustained by reason of furnishing claimant defective material with which to manufacture hubs for artillery wheels. Held, claimant is entitled to relief.

Mr. McCandless writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$925.08. Claim should, however, have been filed as a class A claim and has been considered by this Board as such. Claim was referred to the Board of Contract Adjustment by the Ordnance Claims Board.

2. Under proxy-signed Ordnance Department Contract No. PO368CF, the claimant agreed to manufacture and deliver to the Government 63,300 hubs for 56-inch artillery wheels. Article I, schedule A, paragraph 3, of said contract provides in part as follows:

“The United States will furnish f. o. b. works of the contractor, rough hollow forgings for the hub box, hub ring, and hub band.”

Under date of November 21, 1918, an amendment was made which provides in part as follows:

“The contractor may manufacture and furnish to the United States twenty-five thousand and three (25,003) of said hubs with malleable iron hub caps, instead of malleable steel hub caps.”

Many of the castings furnished by the United States had latent defects. These defects became apparent only after varying degrees

of machining had been done on said castings. The claimant alleges a loss of 925.08 as a direct result of work done upon defective castings which had to be discarded in semicompleted condition. It appears that at certain times defective castings ran as high as 30 per cent of the daily output.

DECISION.

1. Under contract PO368CF and its amendments the Government was obligated to furnish material reasonably free from defects to serve the purpose for which it was furnished. The Government failed to do this, with the result that the claimant was thereby subjected to expense not contemplated under the contract. An obligation arises on the part of the Government to reimburse the claimant for such reasonable expense as was incurred by the claimant as a result of the Government's failure to furnish castings reasonably free from defects. This Board expresses no opinion as to the amount of said expenditures.

DISPOSITION.

1. The Board of Contract Adjustment transmits its decision to the Ordnance Claims Board for appropriate action.

Col. Delafield and Mr. Fowler concurring.

MAY 1, 1920.

**Case No. 2372.**

*In re* **CLAIM OF LANGENBERG BROS. GRAIN & HAY CO.**

- 1. CLAIM AND DECISION.**—Claim under G. O. 103 for \$21, balance due on car-load of hay resulting from clerical misprision or mistakes in weighing. Held, claimant entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented in accordance with G. O. 103, War Department, 1918, and is for \$21, under the following circumstances:
2. The claimant, under a formal purchase order, No. 2530, dated August 3, 1918, was furnishing hay to the Government at \$20 per ton f. o. b. cars at Toronto (Kans.) rate points, and on or about August 21 shipped Baltimore & Ohio car 194122 to the quartermaster.
3. The claimant alleges that the car contained 26,600 pounds of hay. The Government weights at Camp Bowie, Tex., showed 24,520 pounds, a shortage of 2,100 pounds, for which claim is made at \$20 per ton.
4. The claimant took the matter of the shortage up with the zone supply officer in an endeavor to adjust same, but as the Government records showed only 24,520 pounds received, the zone supply officer was not able to adjust same, the man who had weighed the shipment being out of the service. Claimant thereupon appealed to the Board of Contract Adjustment.
5. Affidavit from L. D. Brandt, Douglas, Kans., who shipped the hay, shows that there was 26,620 pounds loaded into the car.
6. The railroad scale weights show gross 67,700, tare 41,500, net 26,200 pounds.
7. The evidence also shows that the Government did not weigh the hay on track scales, but weighed same on wagon scales as it was being unloaded. This method of weighing increases the opportunity for error.

**DECISION.**

1. It is the opinion of this Board that the preponderance of evidence is in favor of the claimant's contention and is therefore of the



opinion that the claimant is entitled to reimbursement for the 2,100 pounds of hay at the contract price of \$20 per ton.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for action in accordance therewith.

Col. Delafield and Mr. Averill concurring.

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MAY 3, 1920.

Case No. 686.

*In re* CLAIM OF THE PENTUCKET NARROW FABRIC MILLS.

1. **INFORMAL AGREEMENT.**—Where, pursuant to request for bids for the manufacture of twill webbing, claimant submits a bid by telegram, in which immediate answer is requested because of the necessity of buying yarns, and on the following day the Government advises claimant that it proposes to send contracts for a definite quantity of webbing at prices therein specified, and subsequently does send such contracts, there is an informal agreement within the meaning of the act of March 2, 1919, and claimant is entitled to be reimbursed for loss on commitments for yarns and for expense incurred in repairing her looms preparatory to the execution of the contract.
2. **WAIVER OR CLAIM.**—Although claimant may have advised Government officers that she had made no commitments for the necessary yarn to fill her contracts and had signed a statement that she was willing to accept cancellation without claim for loss, these statements would not amount to a release of the claim if in fact commitments and expenditures had been made on the strength of the contract and such statements were made in ignorance and under misapprehension of claimant's rights.
3. **FIRE LOSS.**—Under the facts of this case claimant is not entitled to compensation for loss by fire.
4. **CLAIM AND DECISION.**—This claim is for \$21,751.16, under the act of March 2, 1919, for loss on contracts for the manufacture of twill webbing. Held, claimant entitled to recover as indicated in the above syllabus.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States. The amount claimed was originally \$2,000, but the amount has since been enlarged.
2. Andrew Y. Rodger had been doing business in Lowell, Mass., as the Pentucket Narrow Fabric Mills during the year 1918, and for some time before that. He had received a number of Government contracts for the manufacture of webbing. On September 29, 1918, Mr. Rodger died. On October 9, 1918, his widow, Ida M. Rodger, was appointed administratrix of his estate by the probate court of Middle-

sex County, Mass. Mrs. Rodger has attempted since her husband's death to carry on the business which he built up, although her experience in business matters appears to have been extremely limited. On her appointment as administratrix she found that her husband had been engaged in the performance of two Government contracts for webbing and she continued the manufacture of the webbing called for by these contracts to the best of her ability until after the armistice. These contracts are numbered 5031-EQ and 6851-B. Separate claims in respect to these contracts have been presented to the Boston zone supply office and no questions in relation to those contracts are before this Board.

3. This claim, which is numbered 686, and another, numbered 2304, are based on an alleged oral agreement entered into on or about October 26, 1918. Claim No. 686 has to do with an order for 520,000 yards of 2-inch olive drab twill webbing which received contract No. 7808B, and claim No. 2304 has to do with an agreement for 450,000 yards of three-fourths-inch .31-ounce olive drab twill webbing which received contract No. 7788B. Although separate claims have been filed, the evidence shows that if any orders were given they were given for both 2 inch and three-fourths inch webbing. The finding of fact and the decision in respect to the claim which bears the number 686 on our docket are equally applicable to the record and the evidence in respect to claim No. 2304. A separate decision in respect to claim No. 2304 is not necessary.

4. The negotiations which led up to the alleged agreements of October 26, 1918, began with a letter from the cotton-goods branch to the claimant dated September 28, 1918, the second paragraph of which is as follows:

"2. There is enclosed herewith sample of 2-inch olive drab twill webbing weighing  $7\frac{1}{2}$  pounds per hundred yards which contains 180 warp ends of  $12/3$  ply and 24 picks per inch,  $12/3$  ply filling."

On October 7, 1918, the claimant wrote the Government acknowledging receipt of the sample sent in the letter of September 28 and stating:

"We will cost this at once."

The claimant sent a telegram to the cotton-goods branch, dated either October 25 or October 26, 1918, as follows:

"Cotton Goods Branch Office.

"Attention Matthewson, Quartermaster General, 1800 Virginia Avenue NW., Washington, D. C.

"Can give you hundred fifty thousand yards per month three-quarter inch O. D. webbing, beginning January fifth, at three and one-eighth cents per yard, and forty thousand yards per week two-inch olive drab twill weighing seven and a half pounds, beginning

January fifth, at ten and a quarter cents per yard. Must buy yarns at once; please give immediate answer.

"PENTUCKET NARROW FABRIC MILLS."

This was answered as follows:

"OCTOBER 26, 1918.

"From: Office of the Director of Purchase.

"To: Pentucket Narrow Fabric Mills, Lowell, Mass.

"1. Replying to your telegram of October 25th, this office proposes to send you, subject to the usual approvals, contracts for the following:

"520,000 yards of 2'' olive drab twill webbing, to be sulphur dyed in the yarn, to weigh  $7\frac{1}{2}$  pounds per 100 yards and to contain 180 warp ends  $12/3$  ply and 24 picks per inch  $12/3$  ply filling, and to stand a breaking strain of 650 pounds. Deliveries are to be about 40,000 yards weekly, beginning January 4th, 1919, the entire order to be completed by March 29, 1919. The price is to be  $10\frac{1}{4}$  cents per yard net f. o. b. cars Lowell, Mass.

"Also 450,000 yards  $\frac{3}{4}$ '' .31 oz. olive drab webbing, to be in accordance with Ordnance Department specifications, dated April 9, 1918, at  $3\frac{1}{4}$  cents per yard, net f. o. b. cars Lowell, Mass., deliveries to be at the rate of about 35,000 yards weekly, beginning January 4, 1919, the entire order to be completed by March 29, 1919.

"By authority of the Director of Purchase.

"COTTON GOODS SUBDIVISION WEBBING SECTION.

"G. L. MATTHEWSON, *Lieut., Q. M. C., U. S. A.*"

The next in order is a sheet, a copy of which follows, which appears to be a requisition from Maj. Richmond, of the cotton-goods branch, to the purchasing and contracting branch, and containing the data from which a formal contract may be prepared. It bears the approval of the assistant chief of the cotton-goods branch and also the approval of the credits and finance section under date of November 6, 1918.

"Credits and Finance Section.

"War Department, Supply and Equipment Division, Quartermaster General's Office, Washington, October 28, 1918.

"No. CGW-334

"From: Cotton Goods Branch,

"To: Purchasing and Contracting Branch.

"Contractors: Pentucket Narrow Fabric Mills. (Estate A. Y. Rodger.)

"Address: Lowell, Mass.

"Article: Twill webbing.

"Total quantity: 520,000 yards.

"Price:  $10\frac{1}{4}$  per yard f. o. b. cars Lowell, Mass.

"Place of delivery: Shipping orders later.

"Name and location of mills: Pentucket Narrow Fabric Mills, Lowell, Mass.

"Date of delivery: About 40,000 yards weekly beginning January 4, the entire order to be completed by March 29, 1919.

"Contract No. 7808-B.

"Specifications: 2" O. D. twill webbing, to be sulphur dyed in the yarn and to contain about 180 warp ends 12.3 ply and 24 picks per inch, 12/3 ply filling, to weigh  $7\frac{1}{2}$  pounds per 100 yards and to stand a breaking strain of 650 pounds.

"Bond: Waived.

"Remarks: This purchase applies against I. B. R. W 236; G. D. 62; QCP 1922; CE 469: dated Sept. 6, 1918. and is in accordance with contractor's telegram dated Oct. 25, 1918. Use: Shoulder straps for gas-mask knapsacks. Clearance: Army No. 5072, dated Sept. 20, 1918. Appropriation: Medical & Hospital, 1919; Chemical Warfare Service G. O. 62; allotment D 1062.

"(Signed)

H. L. BAILEY,  
"Cotton Goods Branch.

"C. R. RICHMOND,  
"Major, QMC, USA.

"By C R. RICHMOND.

"Approved: (W. W. Coriell) Lt. Col. Q. M. C., U. S. A., Asst. Chief of Branch.

"Approved: Bond required, \$53,300.

"Credits and Finance Section, 11/6, 1918.

"By B. White."

A similar sheet is in evidence in respect to the order for three-fourths-inch olive drab webbing, and this likewise shows approval by Col. Coriell and by the Credit and Finance Section under date of November 6, 1918.

5. Mrs. Rodger testified that formal contracts were sent to her in triplicate, three providing for the manufacture of three-fourths-inch webbing and three for the manufacture of 2-inch webbing, all in accordance with the provisions stated in the quoted letter of October 26, 1918. She stated that the Government required her to procure certificates from the probate court at Cambridge, Mass., to demonstrate that she had been appointed administratrix of her husband's estate and was qualified to carry on the business. She sent to Cambridge immediately for the copies, and as soon as they were received she signed the six formal contracts and sent them to Washington. Her testimony is corroborated by the testimony of her brother-in-law that he saw the formal contracts in Mrs. Rodger's possession and examined them, and later deposited them in the post office at Lowell. The stenographer in the employ of Mrs. Rodger's attorney at Lowell testified that at the request of Mrs. Rodger and her employer, Mr. James F. Corbett, she wrote the following letter, which Mr. Corbett signed:

"OCTOBER 26, 1918.

"F. M. ESTEY, Esq.,

"Register of Probate, East Cambridge, Mass.

"MY DEAR MR. ESTY: Will you kindly send to me by return mail, if possible, three certified copies of the appointment of Ida M. Rodger

as administratrix of the estate of Andrew Y. Rodger, which appointment was made on the 9th day of October; also three certified copies of the decree of the court authorizing the administratrix to continue the business of the intestate?

"Yours, truly,

"JAMES F. CORBETT."

She testified also that she saw Mrs. Rodger at about the time the quoted letter was written, and Mrs. Rodger had a number of war contracts in her hands, but she did not examine them, but that she knew that the certificates of appointment and the copies of the decrees which she had ordered from the probate court were to be sent to Washington in connection with Government contracts.

6. The formal contracts which Mrs. Rodger testifies she executed and mailed to the War Department on or about November 6, 1918, have not been found. There is no evidence that they were ever executed by the United States.

#### DECISION.

1. There has been much confusion in respect to these claims, which is due to some extent at least to the death of Mr. Rodger and the inexperience of his widow. Her position was an extremely difficult one, and it is not unjust to attribute to the circumstances in which she found herself many of the contradictions and uncertainties connected with the determination of these claims.

2. We are satisfied that informal agreements were entered into between the United States and Mrs. Rodger as administratrix resulting from the offer as sent by her on October 25 or 26, 1918, followed by the letter from Lieut. Mathewson of October 26, 1918, and the approval of the order which is shown on the requisition which has been quoted, and also by the fact that formal contracts were sent to Mrs. Rodger and executed and returned by her.

3. No webbing was manufactured by Mrs. Rodger under either of these orders. The only elements of loss as to which any reimbursement can be made are for the purchase of yarn and in connection with work done in the preparation of looms for the performance of the orders.

4. As to yarn, it appears that the claimant ordered from the Tillinghast-Stiles Co., of Providence, R. I., 6,000 pounds of 16/2 yarn at 69 cents and 1,000 pounds of 20/2 yarn at 72 cents. The evidence indicates that this yarn was ordered by the claimant in consequence of the notice sent her on October 26, 1918. None of the yarn ordered on November 2, 1918, has been delivered to the claimant, but she has made an agreement with the Tillinghast-Stiles Co. by which that company has agreed to accept \$1,369.20 in settlement of its claim. The maximum to which the claimant is entitled on its commitments

for yarn would be that amount. The basis for settlement was 15 cents a pound. This yarn was 16/2 and 20/2 and was suitable for the manufacture of three-fourths-inch webbing but not suitable for the 2-inch webbing, which required 12/3 yarn. There was no additional yarn ordered in connection with the performance of the agreement for 2-inch olive-drab webbing.

5. The claimant was unable to establish with any precision what expenditures were made by her after October 26, 1918, and before November 14, 1918, when further performance of the contracts was suspended. The evidence shows that no additional looms were purchased by her after October 26, 1918. The looms which were to be used in the performance of the two orders were those which had been purchased by her husband at second hand in his lifetime. It is evident, however, that some labor was expended in the repair of the looms and in the fitting of them for the performance of the two orders of October 26, and it is possible that some parts were purchased by the claimant for use in the looms. The claimant should be given an opportunity to present evidence as to her expenditures between October 26, 1918, and November 14, 1918, in preparing to perform the two agreements. It may be that an audit by a competent accountant would make certain many matters which are now wholly uncertain.

6. On December 5, 1918, the claimant wrote the zone supply officer in Boston as follows:

"Replying to your letter of the 3rd instant, with reference to contracts 7778-B—450,000 yards of  $\frac{3}{4}$ " .31 oz. O. D. web at \$.03 $\frac{1}{8}$  and 7807-B—520,000 yards of 2" O. D. twill web at \$.1025, beg to state that we had not up to the time of your communication contracted for any yarn to be used in the filling of said contracts.

"We have, however, lost customers for regular merchandise on our looms—in anticipation of working on these contracts."

and on March 27, 1919, she signed the following paper, which was prepared and presented to her for signature in behalf of the zone supply officer at Boston:

"In connection with the termination and cancellation of contract No. 7808-B, being for 520,000 yds. of 2" O. D. twill webbing, the office of the zone supply officer is hereby notified that the Pentucket Narrow Fabric Mills, Lowell, Mass., is willing to accept the entire cancellation without making any claim for compensation therefor."

Neither of these two papers is conclusive against the claimant. The statement in the letter of December 5, 1918, that she had not contracted for any yarn appears to be inaccurate, since the evidence is conclusive that she did place an order for 7,000 pounds of yarn with the Tillinghast-Stiles Co. The statement in her letter of March 27, 1919, that she was willing to accept cancellation of contract No. 7808-B without making any claim for compensation is not in the



form of a release and no consideration was paid the claimant in connection with it. We are satisfied that she signed this paper in ignorance of her rights and under a misapprehension.

7. There is no way in which the United States can be required to recompense this claimant for fire losses.

**DISPOSITION.**

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, office of the Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Hendon concurring.

MAY 3, 1920.

**Case No. 2304.**

***In re* CLAIM OF THE PENTUCKET NARROW FABRIC MILLS.**

- 1. INFORMAL AGREEMENT.**—Where, pursuant to request for bids for the manufacture of twill webbing, claimant submits a bid by telegram, in which immediate answer is requested because of the necessity of buying yarns, and on the following day the Government advises claimant that it proposes to send contracts for a definite quantity of webbing at prices therein specified, and subsequently does send such contracts, there is an informal agreement within the meaning of the act of March 2, 1919, and claimant is entitled to be reimbursed for loss on commitments for yarns and for expense incurred in repairing her looms preparatory to the execution of the contract.
- 2. WAIVER OF CLAIM.**—Although claimant may have advised Government officers that she had made no commitments for the necessary yarns to fill her contracts and had signed a statement that she was willing to accept cancellation without claim for loss, these statements would not amount to a release of the claim if in fact commitments and expenditures has been made on the strength of the contract and such statements were made in ignorance and under misapprehension of claimant's rights.
- 3. FIRE LOSS.**—Under the facts of this case claimant is not entitled to compensation for loss by fire.
- 4. CLAIM AND DECISION.**—This claim is for \$2,000, under the act of March 2, 1919, for loss on contracts for the manufacture of twill webbing. Held, claimant entitled to recover as indicated in the above syllabus.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT AND DECISION.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States. The amount of the claim is uncertain.

2. This Board has made findings and rendered a decision under a claim by the same claimant numbered 686, and has determined that an informal agreement was entered into between the claimant and the United States on October 26, 1918, for the manufacture by the claimant of 450,000 yards of three-quarter-inch 0.31-ounce

olive-drab webbing. It is not necessary to repeat the findings or to restate the decision, which will be found in the record under claim No. 686, to which reference is made.

**DISPOSITION.**

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, office of the Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Hendon concurring.

MAY 3, 1920.

Case No. 2443.

*In re* CLAIM OF FOUNDATION CO.

1. **METHOD OF ACCOUNTING.**—Where, under the provisions of a formal cost-plus percentage contract, claimant is entitled to reimbursement for the cost of maintaining and operating a commissary and the contracting officer and claimant agree as a method for determining such costs that the contractor should charge 33½ cents for each meal, and that if there was a loss under this charge the Government would reimburse claimant, but if there was a profit the Government would receive it, and meal tickets were furnished the contractors by the Government and in the formal settlement under the contract the contractor was charged with all of the meal tickets issued to it, less those accounted for by the contractor, such method of settlement was erroneous, as the contractor should only have been charged with the number of meals served at the price agreed upon, and the contractor is entitled to recover the difference between the amount so erroneously charged against it and the amount computed on the basis of the number of meals served at the fixed price.
2. **CLAIM AND DECISION.**—Claim for \$24,147.34 for commissary expense under G. O. 103. Held, claimant entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal from the decision of Claims Board, Chemical Warfare Service, on a claim for \$24,147.34, on two formally executed contracts under the following circumstances.

2. On March 14, 1918, the Foundation Co., of New York, entered into two contracts, Nos. GPR-55 and GPR-56, with the United States for the construction of a chlorine and power plant at Edgewood Arsenal, Md. These contracts provided in part as follows:

“ARTICLE II.

*Cost of work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of such work as may be approved or ratified by the contracting officer and as are included in the following items:

\* \* \* \* \*

(g) Buildings and equipment required for necessary office, commissary, and hospital, and the cost of maintaining and operating said office, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.”

3. Under the provisions of these contracts, the claimant company maintained a commissary for the purpose of feeding its employees and such employees of the Government as might desire to take advantage thereof. There is no dispute as to the facts in this case, but the difficulty is to determine the method to be used in determining the amount of reimbursement to the contractor for the operation of the commissary. It was agreed that the claimant company was to charge  $33\frac{1}{2}$  cents for each meal. If there was a loss under this charge, the Government should reimburse the claimant, but if there was a profit the Government was to receive it.

#### DECISION.

1. Col. Edward B. Ellicott was appointed construction officer in charge of operations at Edgewood Arsenal, and was named contracting officer in connection with the performance of the two contracts. He ordered the installation of a system for the operation of the commissary whereby all persons who ate meals at the commissary should be counted and the Foundation Co. charged  $33\frac{1}{2}$  cents for each meal served.

2. A count was kept of each meal served, first by a representative of the claimant company and later by Government checkers stationed at the entrances by Col. Ellicott's orders. By order of Col. Ellicott an audit was made of the Government records at the arsenal. The report shows that the total number of meals served was 552,385. Of this total, 550,209 were served to holders of tickets and 2,176 to soldiers and others who had no tickets. Claimant company alleges that it lost approximately \$9,000 over and above the amount of this claim by permitting Government employees to eat without properly signed orders. No claim, however, is being made for this amount.

3. Col. Ellicott testified that the system by which the claimant company was charged with  $33\frac{1}{2}$  cents for every meal served was not only the system which he ordered but was the one that was adopted, and that adjustment should be made on that basis. The amount with which the claimant company should be charged, according to Col. Ellicott's orders, is \$184,128.33, which is the figure determined as correct by the Government auditor.

4. Col. Ellicott directed that books of tickets should be printed and delivered to the claimant, to be sold by it to employees at  $33\frac{1}{2}$  cents per ticket. The use of tickets was a convenience not only to the contractor and its employees but also the Government, in that it did not necessitate the handling and auditing of money by the checkers. By the use of this system the contractor handled all the money and was merely charged for the number of meals served.

The system was also a convenience to the contractor and its employees, in that it did away with handling an awkward sum, as change and tickets could be given to new employees who were without funds and their cost deducted from their wages. One ticket was taken up and punched at the time a meal was served. This prevented the tickets from being used a second time, and it was only necessary to count the tickets and orders after the rush was over to determine the number of meals served. No tickets were ever sold by the Government, nor was any money ever received by the Government from the sale of the tickets. There was no liability on the part of the Government on account of the sale of tickets until or unless they were presented at the entrance for meals. The Government then became liable to the contractor for the cost of the meal served in case the cost exceeded 33½ cents, as it did. It would make no difference to the Government if the contractor gave away some of the tickets to its employees or if bogus tickets were used, as the Government debited the contractor 33½ cents for each meal served.

5. It was contended that the system which Col. Ellicott ordered was not the one which was adopted and that Col. Ellicott is mistaken. There was testimony on the part of some of the men under Col. Ellicott that the system adopted was to charge the contractor with the total in dollars of the books of tickets; that as they were delivered at the arsenal from the printer the books, which were of various values, from \$1 to \$7, were counted and that the tickets in each book were counted also, and that the contractor was then charged with the total as shown by the count. The testimony was that the count of the books and tickets was made under the supervision of Government checkers. We are satisfied that a careful count was not actually made, but that the packages of tickets were many times turned over to the contractor exactly as received from the printer without having been previously opened. No receipt for the tickets was taken from the claimant when the tickets were turned over to it.

6. In preparing the final settlement of the contracts above referred to, Field Auditor Benjamin E. Hinz debited the claimant company with the face value of all the tickets printed and delivered to it and not accounted for. Eight hundred and thirty-seven thousand tickets were printed and delivered to claimant company. Of this number 550,209 tickets were presented for meals and 214,349 tickets were accounted for, leaving 72,442 tickets unaccounted for. Mr. Hinz debited the claimant company for 2,176 meals served on written orders, amounting to \$725.33, and 837,000 tickets, less 214,349 tickets accounted for, totaling 622,651 and amounting to \$207,550.34. This makes a total amount of \$208,275.67 which was debited against claim-

ant company. Claimant company protested to Col. Ellicott, contracting officer, against this charge, and he had an audit made of the Government records at the arsenal. The auditor reported that the number of meals served on tickets and orders was 552,385, and the Foundation Co. should be debited \$184,128.33 instead of \$208,275.67. The difference is \$24,147.34. Col. Ellicott ordered a voucher prepared for that amount and signed it. Maj. Henry O. Gartner, disbursing officer at Edgewood Arsenal, refused payment of the voucher on the ground that he had reason to believe that the system adopted was to charge claimant company with the face value of all tickets delivered to it. This claim is for the amount of the voucher.

7. It was argued that the tickets delivered to claimant company and not used or accounted for may have been sold to its employees and that claimant company has received and retained the proceeds for which it furnished no consideration. If tickets were sold and not used for meals, they are a liability against claimant company until barred by the statute of limitations. It is far from reasonable, if not ridiculous, to assume that 72,442 tickets having a face value of \$24,147.34 were purchased and carried away by employees. The Foundation Co. must redeem the tickets on presentation. The United States is under no obligation to pay anything to holders of unused tickets. One Government witness testified that from his experience in such matters, not more than one-half of 1 per cent of the tickets purchased by employees would be carried away unused. There were 72,442 unaccounted for, and on the percentage suggested, tickets with a face value of approximately \$120 only were carried away by employees. Books of tickets were printed and delivered from time to time and changes were made in style and color. We are satisfied on all the evidence that as the new issues of tickets were received, all tickets of previous issues that were in the hands of claimant company were destroyed and that this fact explains so large a discrepancy.

8. It is agreed by all concerned that the object of any system of checking or counting in the operation of a commissary is to determine the number of meals served. Col. Ellicott's orders were to make that determination by actual count. We are satisfied, as he is, that his orders were obeyed. The evidence falls far short of warranting an inference that his orders were not followed. It remains for the disbursing officer to honor Col. Ellicott's voucher for \$24,147.34. This should be done.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for appropriate action.

Col. Delafield and Mr. Tanner concurring.



MAY 4, 1920.

**Case No. 2507.**

*In re* **CLAIM OF W. GORDON McCABE & CO.**

- 1. COMPULSORY ORDER—IMPLIED AGREEMENT.**—Where the Government commandeers a warehouse and orders all owners of goods stored therein to remove same, and in compliance with such orders claimant removes a large quantity of cotton which it had stored in such warehouse, there is an implied agreement on the part of the Government to reimburse claimant for its expense in removing such cotton.
- 2. CLAIM AND DECISION.**—Claim for \$15,912.16 for expenses in moving cotton under compulsory order. Held, claimant entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim was originally presented by claimant's letter of August 14, 1918, to the Board of Appraisers of the War Department. Thereafter informal petition was filed by the claimant. On March 1, 1920, the Board of Appraisers transmitted claim and accompanying papers to the War Department Claims Board. On March 2 the War Department Claims Board transmitted the claim to the Board of Contract Adjustment.

2. The claimant was engaged in the cotton brokerage business and was a member of the New York Cotton Exchange and subject to the rules and regulations prescribed for members of that exchange. Prior to January, 1918, the claimant had stored 10,329 bales of its own cotton in the Brooklyn warehouse of the Bush Terminal Co., under agreements which then existed, that the cotton was to remain in the warehouse so long as the storage charges were promptly paid.

3. On January 3, 1918, the following requisition notice, signed by the Acting Quartermaster General of the Army, was sent to the Bush Terminal Co.:

“1. Pursuant to the authority vested in the President by the act of Congress approved August 29, 1916 (39 Stat. 545), providing for possession and control of systems of transportation, and by section 10 of the act of Congress approved August 10, 1917 (Pub. No. 41, 65th Cong.), authorizing the requisitioning of storage facilities for supplies connected with the common defense, possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of those portions of the Bush Terminal's docks and ware-

house property described in schedule "A" and shown on the map on schedule "B" on file in this office, in New York Harbor, to the end that they may be utilized to the exclusion of all other traffic, so far as may be necessary, and for such time as may be required, for the transportation of troops, war material and equipment, for the storage of military supplies, and for such other purposes connected with the emergency as may be needful or desirable. Steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use by the Government of the premises, and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1, 1918, to acquire absolute title thereto."

On January 15, 1918, Lieut. Haydn S. Cole, supervisor of docks, wharves, and terminals, office of general superintendent, United States Army Transport Service, New York, wrote the president of the New York Cotton Exchange, requesting him to communicate to all members of the cotton exchange who owned cotton stored in the Bush Terminals and inform them that—

"It is requested that all cotton stored in these warehouses be removed prior to February 15, 1918."

The claimant, whose representative was a member of the New York Cotton Exchange, was given notice accordingly.

By letter of February 21, 1918, the supervisor of docks, wharves, and terminals informed the claimant in part as follows:

"1. By order of the general superintendent, Army Transport Service, all cotton now stored in the Bush Terminal is to be set out in the streets on Saturday morning, February 23rd, at eight o'clock. This action was rendered necessary by a complete inattention on the part of the owners of the cotton in the Bush Terminal to the order of this department under date of February 15, 1918. \* \* \*

"3. In view of what appears to be an earnest effort on your part to remove your cotton, this department has concluded to grant you additional time up to and including March 3rd, 1918."

Just after the receipt of this letter the claimant's representative had an interview with Lieut. Haydn S. Cole, who had charge of the removal of the cotton on behalf of the superintendent of the Army Transport Service, and was told by Lieut. Cole that the Government would pay the claimant for the cost of removing the cotton.

4. In compliance with the said orders and requests of the Government and in reliance of the promise made to it by Lieut. Cole, the claimant did remove from the warehouse of the Bush Terminal Co. 10,329 bales of cotton owned by it prior to March 4, 1918. For the expenses entailed in removing said cotton the claimant now asks reimbursement in the sum of \$15,912.16. It appears from the evidence that the cotton would not have been removed by the claimant had it not been for the orders and requests of the Government, and that all of the 10,329 bales of cotton were owned by the claimant during all the times covered by these proceedings. It further appears that

most of the cotton was transferred by lighters from Brooklyn to the American Docks, New York, and the remaining portion to the White Star Steamship Line Co.'s pier, New York. The harbor was partly frozen over, which results in demurrage charges accruing. It was the practice to insure cotton while in transit and the rules of the New York Cotton Exchange provided—

“A charge of 12½¢ per bale shall be paid by the receiver to the party making the delivery where deliveries are made accompanied by certificates of grade of the inspection bureau.”

#### DECISION.

1. On January 3, 1918, the Government requisitioned the Brooklyn warehouse of the Bush Terminal Co., under authority of the act of Congress approved August 29, 1916 (39 Stat. L., 545), and by section 10 of the act of Congress approved August 10, 1917, commonly known as the Lever Act. To fully carry out the said requisition order, the claimant was requested to remove all its cotton stored at the Bush Terminal Warehouse, by letter dated January 15, 1918, signed by Lieut. Haydn S. Cole, United States Army, supervisor of docks, wharves, and terminals, United States Army Transport Service, New York, which request was supplemented by letter of February 21, 1918, signed by Capt. C. D. Hammond, Quartermaster Corps, for Lieut. Cole. Lieut. Cole also informed the claimant that the Government would pay the cost of moving the cotton.

2. The claimant, in compliance with said requests and promises, did remove 10,329 bales of cotton from the Brooklyn warehouse of the Bush Terminal Co. In performing said services at the request and for the benefit of the Government, the claimant was obligated to pay for lighterage, drayage, insurance, and demurrage charges on the said cotton.

3. It is the opinion of this Board that an implied agreement arose on the part of the United States to reimburse the claimant the fair value of services actually rendered to and accepted by the United States, as well as the necessary expenses which the claimant incurred in so doing, which agreement the Secretary of War is, by the act of March 2, 1919, authorized to adjust.

#### DISPOSITION.

This Board will cause the amount due to the claimant to be ascertained and computed in accordance with its decision and the provisions of supply circulars of the Purchase, Storage, and Traffic Division, and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Hendon concurring.

MAY 5, 1920.

Case No. 1537.

*In re* CLAIM OF THE RUSSIAN REMINGTON RIFLE CONTRACT TRUSTEES.

1. **MACHINERY FOR THE MANUFACTURE OF SMALL ARMS—EXERCISE OF OPTION.**—Where, under a contract with the Russian Remington Rifle Contract Trustees, the Government has an option to buy certain machinery at a price agreed upon between the Government and the trustees, or at a price to be fixed by arbitrators, one chosen by each party and a third by the two so chosen if the two are unable to agree, and thereafter the Government notifies the trustees that it desires to exercise the option, and each party appoints appraisers, who fix the price the Government shall pay for such machinery, and the machinery is taken over and used by the Government before November 12, 1918. The Government is obligated under the act of March 2, 1919, to pay therefor the price so fixed, even though the appraisal was not completed until after November 12, 1918.
2. **CLAIM AND DECISION.**—Claim for \$424,634.33 under the act of March 2, 1919, for machinery for the manufacture of small arms. Held, that the Government is liable for the value of such machinery as fixed by the appraisers.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$424,634.33, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The Russian Remington Rifle Contract Trustees is the correct name of the persons to whom had been conveyed prior to January 2, 1918, the title to machinery, machines, and various kinds of equipment located at the plant of the Remington Arms Union Metallic Cartridge Co. in Bridgeport, Conn. They will hereafter be called the Trustees. Their powers and duties are set forth in a series of agreements bearing date January 2, 1918, a printed copy of which is in evidence, to one of which the United States is a party. In one of these agreements appears the following provision:

“(7) Prior to the sale of any of said machinery or inventory to any other person, the Trustees shall offer the same to the United

States, and the United States shall have an option to purchase the same or any part thereof if it shall make known its desire to make such purchase within 30 days after it receives said offer. The purchase price, if it can not be agreed upon by the Trustees and the United States, shall be fixed by arbitrators, one arbitrator to be chosen by each party and a third arbitrator by the two arbitrators so chosen, if said two arbitrators are unable to agree."

3. The United States had by virtue of this provision an option on all the machinery to which the Trustees held title, or a right to require the Trustees to turn over to the United States such portions of the machinery owned by them as the United States should call for.

4. The United States decided in February, 1918, to avail itself of its option on such of the Trustees' machinery and equipment as should be required for the manufacture of Browning machine guns, Colt pistols, and the Pedersen device. A procurement order was sent to the Trustees on or about February 20, 1918, a copy of which follows:

[War Department, Procurement Division, Sixth and B Streets NW., Office of the Chief of Ordnance, Washington, D. C. Procurement order, War-Ord-P 2822-1484A. P. Work Order. Form of Contract. Important: In reply refer to War-Ord-. File. Symbol. P412.84/1096.]

The contract covering this order will be prepared immediately upon receipt of the contractor's acceptance indorsed on the copy forwarded herewith. No formal contract.

Date:            Summary.            Quantity.

Firm: Henry S. Kimball, Wm. Wallace, Jr., R. Poliakoff, Col. F. W. Abbot, trustees for the Russian Government, as indicated in letter.

Address: 120 Broadway, New York, N. Y.

Price: To be determined later.

Order for: Machine tools and machinery.

SIRS: 1. I am directed by the Acting Chief of Ordnance to hereby give you an order for the machine tools located at the plant of the Remington Arms Union Metallic Cartridge Co., Bridgeport, Conn., but owned by the Russian Government and placed in the hands of four (4) trustees for sale.

2. The United States will purchase all of such machine tools and machinery which can be utilized and may be required for the manufacture of rifles and machine guns.

3. The value of the machine tools and machinery is to be fixed by appraisers, one appointed by and representing the United States, the other appointed by and representing the Trustees for the Russian Government. The basis of the appraisal shall be the fair market value as of to-day, where such is ascertainable, and if not so ascertainable, the cost price of such machine tools or machinery plus the average increase or decrease in value of machine tools and machinery of generally similar character the market value of which can be ascertained. From such market value shall be deducted depreciation in accordance with the percentages as indicated on pages 78 and 79, under the heading "Schedule M" of the Supplemental Agreement between the Russian Government and the Remington Arms Union

Metallic Cartridge Co., Inc., dated September 10, 1917. A copy of said schedule is hereto attached.

4. In case only a part of any machine tools can be utilized for the manufacture of rifles and machine guns, and the value of such part, as fixed by the appraisers, is less than 80% of the value of the complete machine tool, the Trustees may elect to retain such machine tool and dispose of it elsewhere, as they deem fit.

5. Delivery at the plant of the Remington Arms Union Metallic Cartridge Company, Bridgeport, Conn., of the machine tools and machinery will be made immediately upon the completion of the appraisal thereof.

6. Any communication in connection with this Procurement Order should make reference to P2822-1484A. You are requested to notify this office of your acceptance of the inclosed copy. This order and your acceptance thereof indicated above will constitute a verbally and binding contract on both parties.

Respectfully,

(Signed)

SAMUEL McROBERTS,  
*Colonel, Ordnance, N. A.*

5. Schedule M attached to this procurement order contains a list of percentages of depreciation which should be applied when the claimant's property was purchased by the United States.

6. Mr. Percy M. Brotherhood was appointed on March 1, 1918, to represent the United States in the appraisal of the machinery, machine tools, and other items of facilities which belonged to the Trustees. Mr. Brotherhood reported to Col. Charles N. Black of the Procurement Division of the Ordnance Department on August 13, 1918, the result of his appraisal, and handed Col. Black the prices that had been arrived at, together with a schedule of the machinery which had been taken over by the United States. This machinery was listed and is described in schedule A which was attached to the formal contract executed by the United States and the Trustees and dated October 7, 1918, by the terms of which the United States agreed to pay the Trustees the sum of \$3,047,473.35.

7. In August, 1918, the United States determined to take title to other machinery and equipment in addition to that which was the subject of the formal contract of October 7, 1918, and is listed in schedule A attached to that contract and had been appraised by Mr. Brotherhood for the United States. The Trustees were notified that the United States had determined to acquire title to other machinery and equipment, and on August 13, 1918, they wrote Col. Black the following letter:

"For your information I am quoting herewith resolution passed at the meeting of the Trustees held on August 9th, 1918:

"Whereas the Arms Company has selected certain equipment, consisting of transmission, oil dipping tanks, measuring and recording instruments, cranes, hoists, trolleys, and conveyors, scales and weighing devices, partitions, benches, bench drawers, vises, steel



shelving, metallurgical and chemical laboratories from the property on January 2, 1918, conveyed to the Trustees, which selection by the Arms Company has been made in behalf of the United States Government for use on U. S. contracts,

“*Be it resolved*, That the property in question be billed to the U. S. Government on its Procurement Order by the Trustees, the list thereof to be checked at the instance of the Arms Company by the property officer of the United States, and further, that all materials not classed as equipment or machinery shall be billed by the Trustees to the Arms Company.’ ”

Mr. R. Poliakoff was at that time and has continued to be the managing trustee, acting for all the Trustees. On August 14, 1918, Col. Black wrote Mr. Poliakoff the following letter:

“1. Your favor of the 13th inst., in reference to various equipment which has been turned over to the arms company is at hand and fully noted. It is understood that the property in question will be billed to the United States Government at prices to be agreed upon by the representatives of the Procurement Division of the Ordnance Department and the Russian trustees.”

8. On August 16, 1918, Mr. Poliakoff wrote Col. Black requesting him to designate an appraiser for the additional equipment, and on August 27, 1918, Mr. Poliakoff wrote Col. Black calling his attention to the fact that the original procurement order, No. P2822-1484A, was made out to Messrs. Kimball, Wallace, Poliakoff, and Col. Abbott, as trustees for the Russian Government, when it should have been made out to the four trustees as “Trustees for the Russian Remington rifle contract.” On September 7, 1918, Col. Black wrote Mr. Poliakoff, in answer to his letter of August 16, as follows:

“Subject: Appraisal of Russian factory equipment for U. S.

“DEAR SIR: In answer to your letter of August 16th, I am directed by the Chief of Ordnance to advise you that this division has been informed by the Production Division that Lieut. E. W. Fowler, of the Bridgeport district office, will represent Production Division as their representative on the appraisal of the shafting, belting, and other auxiliary factory equipment which was the property of the Russian Government and has been taken over by the Arms Company in connection with their contract with this Government. The Production Division has been advised to have Lieut. Fowler communicate with you.”

On September 11, 1918, the following letter was sent to Mr. Poliakoff, signed “Major Hayden Eames,” by Capt. H. T. Martin:

“Subject: Appraisal of shafting, belting, etc., to be purchased from the Russian rifle trustees.

“SIR: 1. Reference is made to your letter of August 16, 1918, addressed to Colonel C. N. Black, Procurement Division, Ordnance Department, Washington, D. C., on the subject of the designation of a representative of the Production Division, Ordnance Department, au-



thorized to act in collaboration with your representative on the appraisal of the additional equipment at the plant of the Remington Arms U. M. C. Company, Bridgeport, Connecticut, to be billed to the United States Government.

"2. Lieut. G. W. Fowler, of the Bridgeport district ordnance office Procurement Division, 945 Main Street, Bridgeport, Connecticut, is hereby authorized to act as the Production Division, Ordnance Department, representative at this appraisal, and you are hereby formally notified of this authorization.

"3. It has been suggested that, as a method of expediting the appraisal of this equipment, your office prepare as promptly as possible a list of this equipment, which, when received by this office, will be sent through the Bridgeport district ordnance office, Production Division, to Mr. Ryan, of the Remington Arms U. M. C. Company, Bridgeport, Connecticut, who will supplement this list with location of the material in the factory. With this data at hand, the appraisal will be much simplified and consume much less time than the first one. We would appreciate your carrying out this suggestion at your earliest opportunity."

9. The Trustees chose Mr. William Rothen to act for them in the matter of the appraisal, and Lieut. Fowler and Mr. Rothen proceeded with their work. The appraisal of the machinery and equipment on which Lieut. Fowler and Mr. Rothen were working was not finished on October 7, 1918, which was the date of the formal contract by which the United States acquired title to the articles listed in the schedule attached to that contract. It was for this reason that the machinery and equipment which is the subject of this claim was not included in the formal contract of October 7, 1918. Lieut. Fowler left the service of the United States before he had completed the appraisal of the machinery, and after some delay Mr. George W. Walsh was named by the United States and thereafter acted for it, and in conjunction with Mr. Rothen completed the appraisal.

10. The appraisers followed the percentages allowed them for depreciation by schedule M attached to the original procurement order, No. P2822-1484A. An agreement was reached by the appraisers as to the value of the machinery, which was fixed in the amount of \$424,634.33.

11. All of the machinery covered by this appraisal was turned over by the Trustees to the Remington Arms Union Metallic Cartridge Co. in August, 1918, following a decision of the United States to acquire it. A list of machinery, thus acquired, was made up by the appraisers in detail and is found in a paper entitled schedule C, which is attached to the claimant's submission. It was all used after August and before November 12, 1918, in the manufacture of Browning machine guns, Colt pistols, and the Pedersen device, by the Remington Arms Union Metallic Cartridge Co. (See testimony of Lieut. G. W. Fowler, pp. 904-917, of the transcript.)

12. Schedule C shows that the machinery and equipment consisted of steel pulleys, beltings, castings, I-beams, hangers, shaft couplings, shafting and chain drives, all of which is described as transmission machinery. It also includes machinery attachments, laboratory equipment, scales, racks, benches, vises, drawers, tanks, cranes, trolleys, exhaust systems, tote boxes, trays, etc., all of which was accepted by the United States as its property and was used in the manufacture of the three arms.

DECISION.

1. None of the facts in relation to this claim are in dispute. The Government exercised the right which it had to purchase such portions of the machinery and equipment to which the Trustees held title that it desired. The method of determining the price to be paid was that fixed by the procurement order of February 1918, No. P2822-1484A.

2. An appraisal has been made of the machinery and equipment taken over in accordance with the provisions of the procurement order, and the value fixed at \$424,634.33. Payment should be made to the Trustees upon the basis of the appraisal for all such property as is included in the appraisal and has been turned over to the use of the United States.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Ordnance Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

MAY 5, 1920.

**Case No. 2519.**

*In re* **CLAIM OF THE R. H. LONG CO.**

1. **PROVISIONS OF WRITTEN CONTRACT GOVERN.**—The clear provisions of a formal contract control the rights of the parties thereto. Neither the fact that other contractors under similar contracts have presented no claims under identical provisions nor the fact that several months elapsed before claimant presented its claim is conclusive against claimant. Neither is the fact that the representatives of the Government understood that claimant had waived its rights under the provisions in question.
2. **CLAIM AND DECISION.**—This claim for \$202,408.41 is considered as presented on appeal under Supply Circular No. 46 on the grounds of the inadequacy of the allowance made by the Chemical Warfare Service Claims Board and is based upon a formally executed contract for gas-mask knapsacks. Held, claimant is entitled to an amount much less than the sum claimed, to be determined by the Claims Board. Some items found to be proper, others not.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented to this Board by agreement between the claimant and the United States "in the same manner as if a formal appeal had been taken under Supply Circular 46, 1919, on the grounds of the inadequacy of the allowance made by the Chemical Warfare Service Claims Board." The amount claimed is \$202,408.41.

2. A formal contract numbered 1426 was entered into between the United States and the R. H. Long Co., and dated June 19, 1918, calling for the manufacture by the claimant of 1,000,000 gas-mask knapsacks at \$0.5275 each.

The R. H. Long Co. is a corporation located at Framingham, Mass., and had many contracts during the year 1918 for the manufacture of articles which were needed by the United States.

3. The contract provided as follows, under the heading "Changes in specifications":

"The contracting officer may, at any time during the life of this contract, make such changes in the specifications, applying to future deliveries, as he may elect. In the event that such changes make

alteration of the herein stipulated prices just and equitable, the adjustment in price shall be made by contract supplementary hereto."

The items of loss for which the Long Co. makes claim are recapitulated as follows:

Claim 1. Additional rivets for knapsacks delivered.....	\$1,027.07
Claim 2. Additional thread for knapsacks delivered.....	2,950.02
Claim 3. Loss of duck strip.....	24,982.71
Claim 4. Transportation of employees.....	12,623.89
Claim 5. Additional labor cost.....	106,904.95
Claim 6. Uncompleted portion of contract.....	33,515.25
Claim 7. Special facilities.	
Claim 8. Contractor's materials on hand.....	4,350.02
Total.....	186,551.53
Interest at 6 per cent, Dec. 1, 1918, to May 1, 1920.....	15,856.88
Total claim .....	202,408.41

4. In the early part of September, 1918, all contractors, including the R. H. Long Co., who were engaged in manufacturing gas-mask knapsacks were notified of changes in specifications, blue prints were sent illustrating changes, and all were directed to manufacture gas-mask knapsacks thereafter in accordance with the new specifications. The changes were not radical. The most important change was the increase in the width of the gusset or side piece which resulted in a knapsack about one-half inch thicker. The position of some rivets was altered and two rivets were added. The new knapsack was slightly longer than the old one.

5. The deliveries called for in this contract were more than two-thirds completed before notice of suspension of performance was given, and there is no claim made for facilities furnished. On November 11, 1918, the following telegram was sent the R. H. Long Co.:

"Please accept this as notice of cancellation of contract 1426. You will arrange to put no more raw material into process of manufacture, and to discontinue manufacturing processes to the fullest extent practicable. Wire acknowledgment.

"(Signed) GAS DEFENSE DIVISION."

6. A supplemental agreement has been entered into dated March 17, 1919, G. D. 395, reciting that upon suspension of the work the contractor had on hand raw material, supplies, and materials in process of manufacture, and that it appeared that it would be to the interest of the United States to take over said materials, parts, and supplies, and providing for delivery to the United States of the raw materials and partly finished articles listed in schedule A attached, and for the payment of \$33,381.94 to the claimant.

This contract was not executed in full settlement of all claims under the contract, and it contained no clause of release.

7. The issue is as to whether the changes in specifications caused added expense to the contractor to an extent that it would be "just and equitable" to make an adjustment in price as provided in the clause of the contract first quoted.

8. Maj. Dickinson testified that he talked to Mr. R. F. Long on September 9, 1918, about changes that were to be made in the specifications and that Mr. Long said at that time that—

"While it involved a question of two more rivets, the cost of the rivets was small, spread over such a large order of knapsacks, and that the change in specifications would be made on request from me and would not result in any increased cost to the Government. I stated to him that that was the arrangement which I had made with the other knapsack manufacturers, and he raised no objection at that time to doing the same as the other manufacturers were doing."

Mr. R. F. Long testified that the change in the specifications had already been put into effect before Maj. Dickinson came to see him on September 9, and that orders to make the change as soon as possible had previously been given by Capt. Shattuck, and that cutting under the new specifications had been started before receipt of the blue prints, and when Maj. Dickinson came to the plant on September 9 very little was said about changes in specifications, and—

"The matter of cost, the additional cost, was not gone into in any detail. I said that there were two additional rivets, and if that was all there was it would not be very important."

Also that he—

"made absolutely no statement to Major Dickinson about making any claim or giving up any right in connection with any claim that we might make. He called attention to the fact that there was something in the contract that would compensate us for what loss we had owing to the change and said if we had any claim to make claim for it."

Other contractors have not asked for increased compensation by reason of the changes in specifications.

The Long Co. appears to have made no claim for reimbursement on account of the changes in specifications until January, 1919.

#### DECISION.

1. The provisions of the formal contract are clear and precise. They give the contracting officer the right to make such changes in the specifications as he may elect, and "in the event that such changes make alterations of the herein stipulated prices just and equitable, the adjustment in price shall be made by contract supple-

mentary hereto." We believe that the adjustment of this contract should be made in accordance with its terms. It is not necessary to determine as between Maj. Dickinson and Mr. R. F. Long, whose recollection of the conversation of September 9, 1918, is most exact. If the claimant has a right to reimbursement under the provisions of the contract such rights have not been waived or relinquished by reason of anything that took place on September 9, 1918. Neither the fact that other contractors have made no claim for reimbursement by reason of changes in the specifications, nor the fact that this claimant did not present its claim until January, 1919, is conclusive against it. The R. H. Long Co. is entitled to a determination on the merits of the case whether the changes in the specifications made an alteration in the contract price for the knapsacks "just and equitable."

2. In order to make such a determination the entire situation should be reviewed and all the circumstances under which the changes were made and put into effect considered. There was testimony to the effect that the new specifications added to the facility of manufacture and tended to make rejections less frequent. We do not find on the evidence as submitted that the changes amounted to anything more than a provision for a wider gusset, a slightly longer knapsack, and two additional rivets. The claimant has overstated its case beyond all bounds. It manufactured after the changes in specifications, according to its figures, 575,332 knapsacks. The contract price for the knapsacks delivered at \$0.5275 is \$303,487.63. It has been paid for materials on hand and unused \$33,360.82. It now claims in addition, by reason of slight changes in specifications, \$202,408.41, which is not far from 70 per cent of the contract price. Nevertheless, in spite of this exaggeration an examination should be made of the realities of the claim.

3. We take up the itemized statements:

Item 1. Additional rivets for knapsacks delivered-----	\$1, 027. 07
The new specifications required two additional rivets, and under the contract the Long Co. was required to furnish the rivets. It would appear that the claimant is entitled to the cost price of the additional rivets unless it is found that there is an offset in the increase in the ease of manufacture under the new specifications or in a diminished number of rejections. The contract calls for a determination of this question on a just and equitable basis. The claimant alleges that the cost of the additional rivets was-----	
	833. 66
To which it has added overhead of 12 per cent, amounting to-----	100. 04
And a profit of 10 per cent, amounting to-----	93. 37
<hr/>	
A total of-----	1, 027. 07

It would be surprising if so trifling a change as the addition of two rivets should be reflected in an additional percentage of overhead or in an addition of any percentage of profit.



Item 2. Additional thread for knapsacks delivered-----	\$2,950.92
There was much testimony in relation to the amount of thread that was needed in the manufacture of the knapsacks, and the difference in the estimates made by the claimant and those made by the Government was considerable. The claimant's figures show an additional 45 inches of thread for each knapsack on account of the changes in the specifications, especially on account of the increase of the width of the new gussets over the old gussets. It is possible that some additional thread was required. It is unlikely that any such amount as that claimed was used by the claimant. Its figures are that it expended 129,449,700 inches of thread by reason of the changes in specifications, with a total poundage of 1,351.8, which at \$1.89 per pound makes a total price of-----	
	2,554.90
To this is added overhead of 12 per cent amounting to-----	306.59
And a profit of 10 per cent amounting to-----	286.15
	<hr/>
Or a total claim for additional thread of-----	3,147.64

This total is different from that stated in the recapitulation where the amount is given as \$2,950.92. Similar observations may be made as to the charge for overhead and profit as were made in respect to Item 1.

Item 3. Loss of duck strip----- \$24,982.71

This item is based on alleged loss suffered by the contractor in that under the old specifications it was able in cutting the knapsacks to obtain a strip of duck on the selvage approximately 2½ inches wide which had a value of 7 cents per linear yard. When the size of the knapsacks was changed the contractor was unable to save this strip. The contract provided that—

“All scrap and wastage of duck and webbing resulting from the process of manufacture shall become the property of the contractor.”

The only scrap after the change of specifications was narrow strips of duck which had a value of \$372.44 as compared with \$25,355.15 which the claimant alleges it would have realized if the changes in specifications had not been made. However that may be there is nothing in the contract which requires the United States to furnish duck of any special width, or any other provision in the contract by which the Long Co. has any contractual right to a strip of duck 2½ inches wide. The words of the contract are:

“The United States shall furnish the contractor with the following goods: 489,969 sq. yds. of dyed and paraffined Army duck.”

Reimbursement to the contractor in respect to this item should be denied.

Item 4. Transportation of employees----- \$12,623.89

The Long Co. alleges that after the changes in specifications it was obliged to send for employees from many different cities and towns



in eastern Massachusetts and pay their car fares and that this was necessary by reason of the changes in specifications and in order to prevent production from falling off. There was no sufficient evidence which connects the payment of car fares to employees with the changes in specifications. No reimbursement should be made to the claimant in respect to this item.

Item 5. Additional labor cost..... \$106,904.95

The amount of this item is substantial to say the least, as compared with the changes in the specifications. It is so greatly in excess of any increase in labor cost that could have been caused by the changes in specifications that it is difficult to believe that the claimant seriously contends that so large an amount should be allowed. It bases its figures on a chart which shows the number of operations, the pay roll, the production of knapsacks and the unit of labor cost while this contract was being performed. It argues that for the week of September 14, which was the time when the changes in specifications were put into effect, its production fell from 63,823 per week to 44,235 per week and that its unit of labor cost rose from \$0.2504 to \$0.3674. It estimates that it would have been able to produce the knapsacks at a labor cost of \$0.2000 if there had not been a change in the specifications, but that on account of the changes in specifications the labor cost from September 14 to November 11, 1918, per knapsack was \$0.3188, a total loss of..... 72,889.74

To which has been added 33½ per cent for overhead..... 24,296.58

And a profit of 10 per cent, or..... 9,718.63

---

A total additional cost due to changes in specifications of..... 106,904.95

It is possible that the changes in the specifications did actually cause a measurable increase in labor cost. A determination should be made of this matter and if in fact an additional labor cost is found to have been caused by the changes in specifications then an adjustment should be made as the contract provides, on a just and equitable basis.

Item 6. Uncompleted portion of contract..... \$33,515.25

It is claimed that had there been no change in the specifications the contract would have been completed before the armistice and the contractor would have made a substantial profit on the 184,810 knapsacks that had not been completed. It estimates that the contract price for the knapsacks uncompleted would have been.... 97,487.28

And deducting the labor cost and the cost of materials supplied by the contractor amounting to..... 27,611.21

---

There would be a balance of..... 69,876.07

On which there has been paid on account..... 33,360.82

---

Leaving a balance of..... 36,515.25

NOTE.—This total is different from that stated by the Long Co., and is due to an error in subtraction.

This figuring is based on the assumption that if there had been no change in the specifications the contract would have been completed before November 11, 1918. Such a conclusion is so speculative and so entirely unsupported by evidence that no reimbursement should be made to the contractor in respect to this item.

Item 7. Special facilities.

The contractor states in reference to this item:

"Owing to the change in specifications, it became necessary for the contractor to provide additional special facilities in about the same proportion as operators were increased. We call this to attention, although at this time we are not making any claim for these facilities."

There was no evidence before us that the changes in the specifications made additional facilities necessary.

Item. 8. Contractor's materials on hand----- \$4,350.02

This item has to do with estimated requirements for 10/3 thread amounting to 4,805 pounds. If any additional thread was necessary for the manufacture of knapsacks by reason of the changes in the specifications, it should be included in item 2, and what has been said in this decision in respect to item 2 applies to the claim under item 8.

This last item is for interest from Dec. 1, 1918 to May 1, 1920,

amounting to----- \$15,856.88

It is enough to say in respect to this item that interest is not allowed to a contractor on a claim against the United States of the sort shown in this case. It is not contended that the United States promised to pay interest.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for appropriate action.

Col. Delafield and Mr. Hendon concurring.

MAY 5, 1920.

**Case No. 2520.**

*In re* **CLAIM OF THE R. H. LONG CO.**

1. **SETTLEMENT OF FORMAL CONTRACT—FACILITIES.**—A claim for reimbursement on account of additional facilities under a suspended contract containing no special provisions regarding facilities is to be adjusted under Supply Circulars Nos. 111 and 19.
2. **CLAIM AND DECISION.**—This claim for an unnamed amount is presented on appeal on the grounds of the inadequacy of the allowance made by the Chemical Warfare Service Claims Board and is based upon a written contract for gas-mask knapsacks. Held, claimant is entitled to recover for facilities under the supply circulars, but is not entitled to the amount claimed for thread.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim is presented to this Board by agreement between the claimant and the United States "in the same manner as if a formal appeal had been taken under Supply Circular 46, 1919, on the grounds of the inadequacy of the allowance made by the Chemical Warfare Service Claims Board." The amount claimed is not stated.

2. The R. H. Long Co. is a corporation located at Framingham, Mass., and was engaged during 1918 in the performance of many contracts with the United States.

In September, 1918, it was manufacturing gas-mask knapsacks under contract No. 1426, dated June 19, 1918, which called for 1,000,000 knapsacks at a price of \$0.5275, to be delivered at the rate of not less than 60,000 per week, beginning not later than the week ending September 7, 1918.

The Long Co. was asked to submit a bid for an additional 2,000,000 knapsacks, and did so on September 19, 1918, at \$0.45 per knapsack. It received notice that it had been awarded a contract on September 26, 1918, for 2,000,000 knapsacks at \$0.45 per knapsack.

4. A contract was prepared, numbered 1757, dated October 1, 1918, and was signed by the contracting officer, Lieut. Col. Arthur L. Besse, and by the Long Co. before November 11, 1918.

Article XVIII of the contract provides:

"This contract shall be subject to the approval of the Director of the Chemical Warfare Service of the United States Army."

Approval of the contract was signified by indorsement as follows :

“ WAR DEPARTMENT,  
“ OFFICE OF THE DIRECTOR OF  
“ CHEMICAL WARFARE SERVICE,  
“ Washington, Nov. 18, 1918.

“Approved:

“ WM. L. SIBERT,  
“ Major General, U. S. Army,  
“ Director, Chemical Warfare Service.  
“(Signed) WM. K. JACKSON.  
“ By W. K. JACKSON,  
“ Captain, Chemical Warfare Service.”

All the words and figures appear to be stamped except the signature of William K. Jackson.

One of the issues presented is whether the fact that approval of the contract was not given until after the armistice prevents it from being a duly executed contract.

4. A contract in partial adjustment of claims for material purchases and on hand, numbered 396 and dated March 17, 1919, has been entered into under which the Long Co. has been paid \$110,138.95.

#### DECISION.

1. There are two items in controversy, thread and facilities.

As to the amount of thread required for knapsacks the figures of the claimant and those of the Government are far apart. The claimant bases its figures on estimates made by the Rock Island Arsenal of requirements for thread in haversacks and after making due allowance for the fact that it was manufacturing knapsacks and not haversacks the conclusion is reached that approximately 3 pounds of thread were required per 100 knapsacks, or a total for 2,000,000 knapsacks of 60,000 pounds.

The allowance made by the Gas Defense Division is on a basis of 15,000 pounds per 1,000,000 knapsacks, or a total of 30,000 pounds for 2,000,000 knapsacks.

Officers of the Government took apart a number of knapsacks and made measurements of the amount of thread actually used, and in addition made an allowance of 25 per cent for wastage.

2. Figures based on a measurement of the thread actually used amount to a conclusive demonstration of the number of pounds of thread required.

A more reasonable or convincing method of determination of the question could hardly be found.

There is no reason to disturb the allowance for thread which the Gas Defense Division has established.

The 25 per cent allowance for wastage is ample and is sufficient, we believe, to cover the thread that might have been used in basting the knapsacks.

3. The matter of additional equipment which the Long Co. provided in order to perform a 2,000,000-knapsack contract is more difficult.

Contract No. 1757 is dated October 1, 1918, and was executed by both parties before November 11, 1918. The contract is a written one and the rights of the parties are to be determined in accordance with the provisions of the written instrument. The R. H. Long Co. had had no little experience in the performance of contracts with the United States since the beginning of the war. The articles which it had manufactured were of many different kinds. Its business before the war was the manufacture of shoes, but that branch of its business had shrunk in importance in comparison with the very considerable contracts which it had in which large amounts of webbing, duck, canvas, thread, etc., were used.

4. In the performance of its other Government contracts the R. H. Long Co. had found it necessary to secure sewing machines and many other kinds of machines and equipment. There was testimony to the effect that in September, 1918, some of the claimant's other Government contracts were approaching completion and that it was likely that many machines and much other equipment which was used on these contracts would be available for the performance of the additional gas-mask knapsack contract.

5. The testimony as to conversations that preceded the signing of the contract is conflicting.

Maj. Dickinson states that he told Mr. R. F. Long that the provision that appeared in the earlier contract of June 19, 1918, No. 1426, providing for the payment of a portion of the cost of "Jigs, dies, tools, machinery, and appurtenances necessary and provided expressly and exclusively for the production of the articles or services called for in this contract," and providing also that no payment shall be made for the cost of equipment if the deliveries called for in the contract are more than two-thirds completed 15 days after the receipt of the notice of termination, would have to be omitted in the new contract for 2,000,000 knapsacks. One of the reasons given was that Framingham, Mass., was included in what had been established as a "restricted area" by the War Industries Board, and that its regulations were to the effect that no contracts providing for additional facilities should be entered into within the restricted areas. There was evidence that Framingham was included in this area as early as August, 1918.

Another reason given by Maj. Dickinson to Mr. Long for omitting any provision for the payment for facilities was that the Long Co. was already engaged in the performance of a contract for the manufacture of 1,000,000 knapsacks and that it had on hand either in connection with the contract which it was engaged in performing or in other parts of its large factory substantially all the additional equipment that would be needed for the 2,000,000-knapsack contract. Maj. Dickinson also testified that Mr. Long agreed that any provision for payment for additional facilities should be omitted from future contracts for knapsacks.

6. Mr. Richard F. Long testified, on the other hand, as follows:

"Q. I would ask the witness concerning the question of special facilities, whether, at any time, any agreement on your part or on the part of any one connected with the R. H. Long Company was had to relinquish claims for facilities or any other claim under the contract that was not written in the contract?"

"A. There was absolutely no word or mention made (of the relinquishment) of a claim of any kind arising out of anything during the entire discussion regarding the facilities or termination of the contract or any mention whatever of restricted areas. The only mention that was made of facilities was of the additional facilities that we were to provide, and they were gone into in some detail; and it was pointed out and talked over as to the number of sewing machines that would have to be provided to take care of the additional production that was planned; also power presses, printing presses, multigraphing machines, benches, cutting tables, bins, trucks, and trucking facilities."

7. The date of the conversation between Maj. Dickinson and Mr. Long is given as September 9, 1918. Maj. Dickinson testified that he did not give the Long Co. an order for an additional 2,000,000 knapsacks on that day, and we have held in a claim presented by the R. H. Long Co., No. 2521, that no additional order for knapsacks was given on that day, but that in consequence of the conversation the Long Co. submitted on September 12, 1918, to Maj. Dickinson a proposal to manufacture 2,000,000 knapsacks at \$0.5133 each, and that this proposal was never accepted.

8. A new proposal was made by the Long Co. at the request of the Government in the latter part of September, 1918, in which the claimant offered to manufacture 2,000,000 knapsacks at \$0.45 each. This appears to have been accepted by the Government and was followed by the formal contract dated October 1, 1918. There is no evidence of importance covering the negotiations which lead to the acceptance of the claimant's bid of \$0.45 per knapsack. It is difficult to connect the conversation of September 9, which lead to the offer to make knapsacks at \$0.5133 each, with the contract dated October 1, 1918, in which the price is \$0.45 per knapsack.



9. On one matter the evidence is not in dispute. It conclusively appears from the testimony of all the Government witnesses, as well as those of the claimant, and from the numerous letters that were exchanged between the claimant and the Gas Defense Division, that from August through September, 1918, the claimant was constantly and earnestly urged to increase its output of knapsacks beyond the amounts called for in the contract of June 19, 1918. Both Col. Besse and Maj. Dickinson testified that it was the intention to place an additional contract with the claimant for 2,000,000 knapsacks as soon as the claimant demonstrated by increasing its output that it could successfully take care of so large an additional order. That the claimant was able to qualify to the satisfaction of the Gas Defense Division is shown by the fact that the additional order for 2,000,000 knapsacks was given to it on September 26, 1918.

10. We believe that the rights of the R. H. Long Co. depend upon the provisions of the written contract of October 1, 1918. The conversations or so-called oral agreements of September 9, 1918, between Maj. Dickinson and Mr. R. F. Long can not be held to modify or vary the provisions of the contract. The result is that such rights as the claimant has to reimbursement depend on an agreement which contains no provision for the payment of the cost of additional equipment.

11. A contract which contains no termination clause in respect to facilities should be adjusted in accordance with the rules set forth in Supply Circular No. 111 and Supply Circular No. 19, which provides, in section F:

*"Section F.*—Where special facilities were properly provided in connection with the performance of the original contract, necessity of which contemplated by the contractor and included in his estimate of cost at the time the original contract was made, such portion of the cost thereof as would reasonably have been recouped had the uncompleted portion of the original contract been performed. The amount so allowed shall not exceed a sum which shall be computed as follows:

*"From the cost of such special facilities deduct their fair value at the date thereof and state such portion of the remainder as is represented by the ratio of the uncompleted portion to the whole of the original contract."*

Under section F the contractor must establish that additional facilities were needed and provided for the performance of the contract, and that the necessity was contemplated by it and included in its estimate of cost at the time the contract was made. We do not find sufficient evidence in the record to warrant the denial to this contractor of the relief that has been granted to many other contractors under circumstances not dissimilar.



12. It is apparent, however, that the R. H. Long Co. had already provided a very substantial proportion of all the jigs, dies, tools, machinery, and appurtenances that would be needed in the performance of its additional contract for 2,000,000 knapsacks in connection with the performance of its earlier contract for 1,000,000 knapsacks. No allowance can, of course, be made to it for such facilities as it provided for the performance of its 1,000,000-knapsack contract. It also appears that the R. H. Long Co. had on hand in September, 1918, many machines which it was using or had been using in the performance of other contracts. No allowance can be made to the claimant in respect to any such machines. One of the important reasons why the 2,000,000-knapsack contract was given the R. H. Long Co. was because the officers of the Government knew that the Long Co. was the owner of a very large amount of equipment.

13. On the other hand the testimony shows convincingly that certain additional machinery was necessary in order to enable the claimant to take care of the additional 2,000,000-knapsack contract. As to such additional machines and equipment, so far as they were necessary to enable the claimant to perform its contractual obligations, and provided the necessity was contemplated by the claimant and included in its estimate of cost at the time the contract was made, reimbursement should be given in accordance with the rules laid down in the supply circulars of the War Department.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for appropriate action.

Col. Delafield and Mr. Hendon concurring.

MAY 7, 1920.

**Case No. 2535.**

*In re* **CLAIM OF WINFIELD WEBSTER & CO.**

1. **OFFER OF COMPROMISE.**—Claimant can not be held to the terms of an offer of compromise settlement where same was not accepted and consummated, but in proper case is entitled to recover under the supply circulars and the terms of the proposed settlement will be disregarded.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$4,653 loss on tomatoes. Held, claimant entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under P., S. & T. Supply Circular No. 17, 1919, by reason of an alleged agreement between the claimant and the Subsistence Division of the Quartermaster Corps, United States Army, and the claim comes before this Board on appeal from the decision of the Claims Board, office of Director of Purchase.

**STATEMENT OF FACTS.**

1. In this claim as originally filed claimant contended that it had an informal agreement with the quartermaster as of September 27, 1918, which was suspended December 12, 1918, at which time it had on hand undelivered a certain estimated quantity of cases of No. 2. No. 3, and No. 10 tomatoes, which it sold thereafter at the best prices obtainable with due diligence, but at a loss. That in December, 1918, claimant attempted to reach an adjustment of its losses with the zone supply officer in New York on the following basis:

For No. 2 tomatoes.....	15 cents per case.
For No. 3 tomatoes.....	20 cents per case.
For No. 10 tomatoes.....	10 cents per case.

Applying these figures to the estimated quantity of cases, this settlement would have allowed claimant a total sum of \$4,653. Claimant consented to this adjustment, but it was never carried out, and claimant later discovered that the estimated quantity of cases had been inaccurately calculated and that it actually had on hand only a considerably less number of cases. If this revised number of cases was used as a basis of calculation, the total amount due claimant

under the proposed settlement would have been greatly reduced. Claimant thereupon asked that this attempted compromise agreement be set aside as having been reached under mutual mistake of fact and that its compensation be adjusted on the basis of its actual losses.

2. After a hearing this Board rendered a decision on January 20, 1920, to the effect that claimant had a valid agreement with the quartermaster as of September 27, 1918, within the terms of the act of March 2, 1919, and issued its certificate C and document setting forth the nature, terms, and conditions of this agreement, and forwarded the same to the Claims Board, office of Director of Purchase, for adjustment of said agreement in accordance with said opinion.

3. The Claims Board, office of Director of Purchase, in making an award pursuant to these instructions, has used the accurate number of cases of tomatoes on hand, but has applied to this quantity the same unit prices per case agreed to by claimant in the attempted compromise agreement of December, 1918. From this decision claimant has appealed to this Board on the ground that the attempted settlement should be disregarded for all purposes and that this claim should be adjusted on the basis of the difference between \$1.30 per dozen cans, its actual cost of manufacture as determined by the Federal Trade Commission, and the cost per dozen cans at which the tomatoes covered by the claim were disposed of by claimant, after suspension of its agreement, with due diligence, applying this difference to the accurate number of cases on hand and undelivered at the time of suspension.

#### DECISION.

1. Claimant had a valid informal agreement as of September 27, 1918, within the terms of the act of March 2, 1919, with the Subsistence Division, Quartermaster Corps, United States Army, which agreement was suspended December 12, 1918.

2. This agreement should be adjusted in accordance with Supply Circular No. 111.

#### DISPOSITION.

1. The claim will be returned to the Claims Board, Office of Director of Purchase, for appropriate action in accordance with this opinion.

Col. Delafield and Mr. Hope concurring.

MAY 8, 1920.

**Case No. 642.**

*In re* **CLAIM OF FOSTER & STEWART CO.**

- 1. INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR ORDER.**—Where claimant was promised an order for 300,000 yards of duck cloth at price to be later fixed by appraisement, and where claimant was advised and instructed to proceed to perform such order, even though the formal order was never given and no deliveries made thereunder, there arose under the act of March 2, 1919, an obligation on the part of the United States Government to reimburse claimant for loss sustained in preparing to perform such order.
- 2 CLAIM AND DECISION.**—This claim for \$39,929.11 arises under the act of March 2, 1919, and is presented upon the theory that the United States Government is obligated to reimburse claimant for loss sustained preparatory to performing a promised order. Held, claimant is entitled to the relief sought.

Maj. O'Neill writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claims, Form B, has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1919, for \$39,929.11, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant was a manufacturer of cotton duck but was not classed by the cotton goods branch, Clothing and Equipage Division of the Quartermaster Corps, as a normal producer of duck. Claimant had, however, a formal contract for the manufacture of 250,000 yards of duck and had been requested not to sell the further output of their looms without first offering it to the Government.

3. In August, 1918, claimant's formal contract was nearing completion, and Mr. John C. Foster, treasurer of claimant company, visited Washington for the purpose of procuring contracts, or, failing in this, to secure the permission of the Government to use their looms for commercial purposes. He was referred to First Lieut. George Hussey, procurement officer for heavy cotton materials at the New York zone supply office.

4. Omitting previous, immaterial conversations, the following negotiations were had: Lieut. Hussey asked: "What deliveries can you make on 12.9 (duck)?" Mr. Foster said that deliveries could be made at the rate of 25,000 yards per week. Lieut. Hussey then said:

"We will have to give you a mandatory order and the price will be fixed by the Board of Appraisers. \* \* \* I believe your order is the first mandatory order to be given by this department where no price has been fixed, and we will send you a notification of such an order."

The exact date of this conversation has not been established, but it has been stated by Lieut. Hussey that it was between August 20 and 28, 1918. At this time it was also agreed that the deliveries should begin on September 15, 1918, and be at the rate of 25,000 yards weekly. Mr. Foster stated: "It will be necessary for me to secure yarns at once." To which Lieut. Hussey replied: "Yes; I understand that. You go ahead and purchase your yarns and start deliveries."

5. Under date of August 30, 1918, Lieut. Hussey wrote claimant as follows:

"We are to-day recommending a mandatory order for 30 $\frac{1}{4}$ " No. 12.9 duck to the extent of 300,000 yards, delivery to begin September 15 and continuing until completed."

"This order is issued in mandatory form, and the price, it is to be understood by you, will be fixed by the Board of Appraisers, and it will be necessary for you to submit your details of cost, including in the same the price of yarns. These yarns to be presumably at the fixed price of the Government. If, after every effort is made by you, you are unable to secure the yarns at the Government fixed price, you are to communicate with Mr. B. Etherington, 1800 Virginia Ave. NW., Washington, D. C., who will assist you in this end \* \* \*."

6. Again, on September 10, Lieut. Hussey wrote claimant as follows:

"1. You will forward, please, at once, to this department detailed costs of goods recently purchased from you, in a sworn statement to contain the following items: \* \* \*

"2. Your contract C. G. 1922, for 300,000 yards of 30 $\frac{1}{4}$ " 12.9 gray duck, is held up pending receipt of this statement \* \* \*."

7. Under date of September 13, 1918, the procurement section of the cotton-goods branch addressed claimant in the following language:

"Referring to your recent offering of 300,000 yards of 30 $\frac{1}{4}$ " 12.9 gray duck, C. G. 1922, at a special meeting of this department, held to-day, it was decided that the best method to employ in determining prices on mandatory orders was to have producers furnish this department as early as possible the following information:

"(a) A detailed statement of your cost on the above style.

"(b) Value of your plant, figured as of January 1, 1914."

8. In compliance with the request made in the letter of September 13, 1918, the statement therein mentioned was prepared and delivered in person by Mr. Foster to the New York zone supply office, at which time he was advised that the same appeared to be all right.

9. The New York zone supply office had some difficulty in drawing up a mandatory order in proper form, and in the meantime the credits department of this office withheld action pending the result of an investigation then being made by the military intelligence department of a manufacturer with whom the claimant had had some dealings. The claimant was later exonerated but the compulsory order was never issued, nor was any duck manufactured or delivered under this agreement.

10. The claimant alleges a loss of approximately \$54,000, but asks an adjustment under the schedule of standard allowances outlined by Mr. Malcolm Donald, Chief of the Clothing and Equipage Division, as follows:

*Ordered Aug. 12, 1918.*

Avon Mills:

50,000 lbs. delivered, at 63 cents, \$31,500—30 per cent adj----- \$9, 450. 00

*Ordered Sept. 27, 1918.*

Marlboro Mills:

100,154 lbs. delivered, at 63 cents, \$63,097.02—30 per cent adj--- 18, 929. 11

*Ordered Sept. 30, 1918.*

Turner-Halsey Co.:

32,760 lbs. delivered, at 63 cents, \$20,638.80—30 per cent adj---- 6, 191. 64

67,240 lbs. not delivered, adjustment paid----- 4, 729. 19

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39, 299. 94

#### DECISION.

1. There was an agreement entered into between the claimant, acting through its treasurer, Mr. John C. Foster, and First Lieut. George Hussey, Quartermaster Corps, procurement officer, New York zone supply office, on or about August 20, 1918, which will be adjusted under the act of March 2, 1919.

2. The claimant is entitled to an adjustment under the schedule of standard allowances of the Clothing and Equipage Division of the Quartermaster Corps, on all yarns purchased subsequent to August 20, 1918, which were delivered, together with the sum paid to its subcontractor, Turner-Halsey Co., for the cancellation of the undelivered portion of the yarn purchased from that concern, the same having been purchased subsequent to August 20, 1918.

## DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to Claims Board, Director of Purchase, for action in the manner prescribed under specification C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division, 1919, and in accordance with this opinion.

Col. Delafield and Mr. Low concurring.



MAY 20, 1920.

Case No. 470.

*In re* CLAIM OF BUCKMAN & PRITCHARD (INC.).

(Reconsideration.)

1. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$83,701.44, based upon an oral agreement for facilities in connection with a proxy-signed contract for rutile. This Board held that there was no oral agreement and that claimant was only entitled to relief under the written contract. Affirmed on appeal to the Secretary of War with the exception of one clause holding that claimant did not contemplate any amortization of the cost of facilities out of the price fixed in the written contract. The determination of this fact is left to the Claims Board, Chemical Warfare Service, to which the claim is now referred for settlement. (For the facts, see the decision of this Board, Vol. I, p. 789.)

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim, in which a petition was filed before this Board on June 11, 1919, in pursuance of Supply Circular No. 17, and under the act of March 2, 1919. The petitioner asks for \$83,701.44, being the amount expended for new machinery, less the present money value of the plant, alleged to have been spent in reliance upon a verbal agreement with the Procurement Division of the Ordnance Department, and with the War Industries Board for the manufacturing of rutile. This matter was first heard by the board of contract adjustment of Edgewood Arsenal, and a settlement recommended by that board to the Board of Review of the Chemical Warfare Service. The latter board, however, disapproved the findings and recommendation of that board in a letter of March 30, 1919, in which the following statement was made:

“The only settlement of this matter that can be made is a settlement in pursuance of the terms of the original contract. It is noted that the original contract provides that ‘in the event of the cancellation of this contract \* \* \* the United States will inspect the completed articles or material then on hand and such as may be completed within 30 days after such notice, and will pay to the contractor the price herein fixed for the articles or material accepted by and delivered to the United States.’ It is also noted that there is a statement, among the papers submitted, that at the time of suspension

of work under this contract the contractor was beginning to produce rutile at the contract rate. If, therefore, any settlement is to be made under this contract it would be for the raw material, etc., on hand at the date of suspension, proper allowance for partly finished products, etc., together with such allowance as might be proper under the clause of the contract above quoted."

2. In the winter and spring of 1918 there was a limited supply in this country of the ore from which is produced rutile, from which is converted titanium-tetra chloride, a compound used in the manufacture of smoke bombs. There was a deposit of this ore in Virginia, and this deposit was being worked by the American Rutile Co., but the supply was insufficient to meet the needs, or the expected needs, of this Government and its associates in the war. In the early spring of 1918, therefore, Government agents got word that there was a deposit of this ore in Florida. Later on, through the instrumentality of Mr. William F. Meredith, president of the Titanium Alloy Manufacturing Co., of Niagara, N. Y., who was also an officer and director of Buckman & Pritchard (Inc.), Mr. Meredith and Mr. H. H. Buckman, of the petitioner's company, met in Washington in the office of Maj. Gelshanen, the officer in charge of the purchase of chemicals for the Ordnance Department. The Ordnance Department at that time was exercising the functions that afterward were taken over by the Gas Defense Service. Maj. Gelshanen turned these parties over to Lieut. Williams in his office, and a conference was there held as to the production of rutile. Messrs. Meredith and Buckman assured Lieut. Williams that petitioner could produce rutile, and a requisition for an order for 410 tons, at \$90 per ton, of that material was then made out on the 19th day of March, 1918, by the petitioner and a contract for this 410 tons was later sent to petitioner and signed by the petitioner on the 18th day of April, 1918. This agreement contained among others the following provisions:

"The contractor shall make deliveries at the rate of two (2) tons per day, beginning as soon as the contractor's plant is equipped to produce rutile, which is estimated shall be within six (6) weeks from the date of this contract.

\* \* \* \* \*

"In the event of the cancellation of this contract, as in this article provided, the United States will inspect the completed articles or material then on hand and such as may be completed within thirty (30) days after such notice, and will pay to the contractor the price herein fixed for the articles or material accepted by and delivered to the United States. The United States will also pay to the contractor the cost of the component materials and parts then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specifications referred to in schedule 1 hereto attached, *and also all costs theretofore expended and for which payment has not previously been made and all obligations incurred solely for the performance of this contract of*

*which the contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the contractor for work, labor, and service rendered under this contract."*

3. During the conferences at which the order for the 410 tons of rutile was agreed upon it was represented that the petitioner would have to receive certain financial assistance in carrying out the said contract for 410 tons of rutile, and \$50,000 was asked for. It was brought to the attention of these parties by Lieut. Williams that only one-third of the face of the contract could be allowed as a loan to any manufacturer, which in that case amounted to \$11,000. In these circumstances some legitimate way was sought by which a larger loan might be made, and it was suggested by Messrs. Buckman and Pritchard that an order for a larger amount of rutile be given so that the amount of the loan might be raised. The procurement officer, however, could not increase the order because he had before him no requisitions that would authorize him to increase the order. In pursuance of the suggestions made, however, Mr. Buckman went to see various Government officers, including Brig. Gen. Dickson, in the office of the Chief of Ordnance, Board of Control; Col. Ragsdale, of the Ordnance Department; and others, with a view to having the order increased, but without success. The matter was then taken up with the War Industries Board and with the War Credits Board with a view to securing financial assistance, and after considerable delay and investigation of the standing of the petitioner and its financial ability, a loan of \$11,000, being one-third of the face of the contract agreed to be let, was made to the petitioner to be used in performing the contract for 410 tons of rutile, but this loan was made only after Mr. Meredith and his Titanium Alloy Manufacturing Co. jointly and severally guaranteed the repayment of same.

4. The petitioner's then-existing plant in Florida was an old plant which had been engaged in working the ore deposit and separating therefrom ilemite, zircon, monzonite, and other ores of commercial value, but the plant was at that time closed down on account of not being able to separate these chemicals on a paying basis. The petitioner had already bought certain machinery and, prior to its dealings with the Government, had contemplated making extensive improvements in its plant for the purpose of running it on a paying basis in the separation of the chemicals above named. Rutile is secured from this ore, not by a new or different process from that used in obtaining the above chemicals, but by a continuation and refinement of same, so that in order to produce rutile it was not necessary to have a new plant and new machinery, but to add to the then-existing plant used in the production of the ores certain other processes of refinement for separating the rutile.

5. The claim of the petitioner may be briefly set out in the words of the petitioner as follows:

"In the fall of 1917 and winter and spring of 1918, the Government found this material would be required in large quantities for war purposes, and, upon investigation, learned that there were two available sources of supply: The American Rutile Company, of Virginia, which had a small deposit of rutile, and the claimant, which had a large deposit of the material on property owned by it in St. Johns County, Florida.

"The Government thereupon solicited the aid of the claimant for the purpose of producing the material in large quantities, and, as a preliminary step, awarded it a contract for 410 tons.

"At, before, and after the time the contract for 410 tons was entered into, and before the plant was completed, the claimant was assured by Major W. H. Gelshenen, of the Ordnance Department, Procurement Division, and by the War Industries Board that the Government would require from it a very large tonnage of rutile, much larger than that evidenced by contract No. P 4430-1498 TW. Acting upon these assurances, the claimant installed equipment and developed a process sufficient to insure the production of at least two tons of this material a day.

"Had war continued, it would have been called upon to deliver large quantities of rutile, and it was in the position to do this when the armistice was signed. Upon the signing of the armistice the contract of March 19, 1918, No. P 4430-1498 W was cancelled, and, of course, the promised further contracts were not awarded the claimant."

In other words, the petitioner is claiming, in effect, that there were assurances by Government agents that orders for rutile would be forthcoming for at least 2 tons per day for an indefinite period, and that the order that actually came for 410 tons was the first or initial order carrying out that agreement, and that upon the cancellation of the larger assured orders the rules of compensation upon cancellation mentioned in the written order would prevail; and that, acting upon those assurances, the petitioner made the expenditures mentioned, and the armistice having intervened, and no additional orders having been given, the petitioner claims reimbursement for expenditures made for machinery.

6. The written contract, as will be observed, provided for 2 tons per day of production, beginning 60 days after the plant was put into condition to produce, which was estimated at six weeks. On account of difficulties of getting machinery, and other difficulties for which the Government was in no way responsible, the petitioner had just gotten into shape to produce rutile at the time the armistice was signed, and no rutile was ever delivered to the Government under the written contract. When this case came before the board of contract adjustment of Edgewood Arsenal, the question of delay in the execution of the contract for the 410 tons of rutile

was thoroughly investigated, and that board was of the opinion that the delay was not due to the fault of the petitioner. The papers in the case indicate that the delay was due mainly to failure on the part of the Huff Electrostatic Separator Co., of Boston, Mass., to deliver promptly and in proper condition certain machinery necessary to be used by the petitioner in separating the rutile from the ore.

7. The alleged assurances are said to have been made to Messrs. Meredith and Buckman in the conferences that were held by them with Government officials at the time the requisition was put in for the order for 410 tons of rutile and at the time negotiations were carried on for the loan of \$11,000. It is deemed essential that pertinent evidence of Messrs. Buck and Pritchard, and of persons with whom they discussed these matters, should be set out at some length.

(a) Mr. Meredith testified as follows (transcript, p. 23 et seq.):

“Question. Can you point out any statement that was made by any of these officers with reference to future business? As I understood you, you said that the requisition had come through for four hundred and ten tons, but that, depending upon further decision as to the need of more of this stuff either in the Army or Navy, it was expected and believed by these people that more orders would come through. Is that correct?

“Mr. MEREDITH. Yes, sir: absolutely correct.

“Question. Was there anything in that statement except the expectation on behalf of the parties who were speaking to you that additional orders and demands would come through for it?

“Mr. MEREDITH. Well, the expectation was this, sir, that the Chemical Warfare Division told us that there was absolutely no question but that they needed it. The French Government told us the same thing and all the officers whom we spoke to, or practically all of them, in the Procurement Division and in the Ordnance Department and in the Navy Department told us exactly the same thing. They said, ‘You might as well ask us, Do you need gunpowder?’ They said, ‘We need this thing and are going to order more of it. The only thing is they don’t know and they have not made up their plan as to the amount they need of it.’

“Question. Of course, what they would need would depend upon the termination of the war, for example, or the use——

“Mr. MEREDITH. The stage that the war took, whether it was going to remain trench warfare, whether they were going to carry on heavy smoke barrages, or whether it would take some other twist; but that it was needed and they expected it to be needed in large and increasing quantities I do not think there is a question of doubt.

“Question. Were you, Mr. Meredith, acting in the course you pursued afterwards in regard to your plant merely upon your business judgment as to future needs?

“Mr. MEREDITH. I do not quite understand you there, sir.

“Question. From the information you had from these people with reference to probability for their needs for this material in the Government operations, were you then acting upon your business judgment?



"Mr. MEREDITH. In ordinary times? No; I would not have done it.

"Question. *I mean, were you acting under the circumstances of that particular case and those particular times upon your business judgment as to the probable need?*

"Mr. MEREDITH. *Absolutely.*

"Question. *You were assuming the risk, then, of your expenditures expecting future orders?*

"Mr. MEREDITH. *Yes, sir. That is the only reason I would have made those expenditures.*

"Question. Then, upon what theory do you ask the Government to pay you for those outlays?

"Mr. MEREDITH. Because the Government did not 'come across.' There were none of these future orders at all.

"Question. But they would have ordered if they had needed it, would they not?

"Mr. MEREDITH. Yes; but they did not need it. They suddenly changed their minds.

"Let me explain something to you, sir. This row was—not 'row,' but activity on behalf of the Government officials for rutile—was caused largely by the French. They gave our officials the impression that they had to have this above everything in trench warfare; and they appointed the Procurement Division, and the Procurement Division appointed us, and the other rutile manufacturer, and we went into it, using our best judgment and fully expecting that the Government would unquestionably come across with very much larger orders. Then we relied entirely on that clause in there that in case of cancellation we would be reimbursed by the Government.

"Question. You refer to the clause which has been read in the opening statement of your counsel?

"Mr. MEREDITH. Yes, sir.

"Question (by Mr. BROWN, counsel for petitioner). Do you recall having ever told Mr. Williams anything regarding the amount that would be required by you for the production of rutile?

\* \* \* \* \*

"Mr. MEREDITH. No; I can not say that I did, other than to say that we had to have as much money as we possibly could get. I do not know that I ever put it down in black and white as to the amount. I know we were very much disappointed when I found we could only get \$11,000.

\* \* \* \* \*

"Mr. BROWN. *Were there any assurances made to you then as regards your compensation for getting this money elsewhere, in the way of promises of business?*

"Mr. MEREDITH. *No; except the assurance that they had been told that there were large orders coming through.*

\* \* \* \* \*

"Lieut. Col. WILLIAMS. There is one more question that I want to ask, in order to be certain that I was right in understanding you and you were right in answering the question.

"*I understood you to say that at the time that these representations were made to you by parties in Washington in regard to their expecting a number of orders to come through for this rutile that then, acting upon your expectation as to future business, you increased*

*your facilities at Florida for the purpose of meeting that demand when it should come through. Is that correct?*

"Mr. MEREDITH. *Yes, sir.*

"Lieut. Col. WILLIAMS. *And that you were exercising your own business judgment in doing that?*

"Mr. MEREDITH. *Yes, sir.*"

(b) Mr. H. H. Buckman testified as follows (Transcript, p. 49 et seq.) with respect to his conferences with Government agents:

"Mr. BUCKMAN. \* \* \* The very first time we spoke with Lieut. Williams, I told him we wanted an advance of \$50,000, and he immediately said: 'Under the present circumstances that is absolutely impossible, because we are limited in making these advances to thirty per cent of the total value of the order that is being placed, and the order that we have before us now is four hundred and ten tons.'

\* \* \* \* \*

"Then, if I remember correctly, for several days we were shunted off entirely from the question of the amount of this first order, or the placing of this order through an effort on the part of ourselves and also on the part of the Ordnance officers to finance us. A suggestion was made by one of the procurement officers—I think it was Lieut. Williams, or it may have been Maj. Gelshenen—that we might obtain our thirty per cent advance and then the Ordnance Chief might be willing to purchase outright this special equipment which was necessary and place it in our plant and hold title to it, and in that way relieve us of a considerable portion of the financial burden, but at the same time not attempting the impossible under the law in the way of financing.

"I embodied that suggestion in a proposal which I made to the Procurement Division, but they apparently did not see fit to accept that. Whether it was the Procurement Division or the Ordnance Chief, or who it was, I do not know.

"We were told that thirty per cent was the maximum that they could advance. I think they were sincerely attempting to get us financed, because they were very anxious to obtain the rutil. They were doing the best they could.

"It was then suggested by the procurement officers that there was one other way out, that they might raise the immediate requisition or order or contract instead of four hundred and ten tons to a larger amount, so that one-third of it would give us our \$50,000, but for reasons which I do not know they were unable to do it. It was suggested that I might obtain some information which might lead up to an immediate increase of that order, which they all agreed was merely technically deferred, by going to the various departments, especially the trench warfare section, and the board of control, and trying to find out what the program of the War Department was for the use of that material, and trying to find somebody who had the authority to increase immediately that requisition, which all felt was very inadequate for the needs at that time. I say they felt it. I mean they openly expressed it.

"I went out three or four days here in Washington, keeping in touch occasionally with the Procurement Division and reporting where I had been. I went to the office of the Chief of Ordnance and



saw Brigadier General Dickinson on this subject. He said he only knew a very little about it, but he would try to find out. He had several telephone conversations with other officers in various departments, and I asked him the question, after he had gotten through, 'If you are going to use so many pounds of this material in each shell and fire shells at the rate that the British commander reported last week shells were fired over a given length of trench, I figure that the supply will last about six weeks of active campaigning.'

"He said, 'I think so, too, and there is no question but that the order ought to be increased.'

"He could not seem to find anybody who had the authority to increase the order. He telephoned to a number of officers. I do not know their names. He called them by number, of course, and I sat there and listened to him telephoning. Finally he told me, 'This is not my job. I am a soldier and I am not here to buy rutile or to buy titanium-tetra-chloride,' and he said, 'I will have to pass you on to the board of control and see what you can find out.' And he got up and left. He had done his best, I think.

"Then I went to the board of control and I saw Maj. Westcott. I think he was the military man at the head of that board. There were some civilians on the board. They all knew about it. They all told me, 'Yes; that is one of the things we want to get; we have got to have it in quantity.'

"I said, 'Can you not arrange to have a larger order placed immediately for this material, so that we can finance its production, without which you will not get it, because we can not afford it.'

"They said, 'We will do our best.'

"They became active for a day or two, but did not seem to meet any better success, except to assure me absolutely that there was no question but what this thing was needed in large quantities and that the Army had to have it, but that at present the state of the organization of the War Department was such that they had not gotten down to the fine points of say just how much they wanted, and that one requisition for four hundred and ten tons—no; I think there was a requisition for five hundred tons, about that figure—that came through. It did not jibe exactly with the four hundred and ten tons. It was a little bit more.

"They told me they could probably find out something later, but right then they could not do it, and they suggested that I go to Col. Ragsdale, of the Trench Warfare Division, where those things were supposed to originate.

"I went to see Col. Ragsdale, and he turned me over to Col. McPherson. Col. McPherson was immensely interested and said, 'Yes; that was right.' I laid before him the definite figures that I had and told him that to a man up a tree it looked so utterly inadequate for the needs of the Government; if they needed as much of it as we were told by all hands that they did. He said, 'That is quite true. I think it is inadequate. We will need a great deal more of it; but this is the only requisition that has been put out, and I am not going to assume the authority at the present moment of putting out more. We will need more, and when we find out exactly what our plan is the other requisitions will be forthcoming promptly.'

"I will not go into detail any further with the officers I saw, but I can say that I saw at least seven other officers. I counted them

up out of a notebook the other day. Besides those, there were at least seven other officers that I went to see, all of whom did the best they could because they were all very much interested to get this thing arranged. But we could not do it, and I went back to the Procurement Division and told them we could not do it.

"There was a pause then of a day or two, in which I went outside. If I remember rightly, I went to New York and made some inquiries at our bank in Jacksonville to see whether we could finance this thing if we promised the people who could loan us money that we were assured of a large business in rutile.

\* \* \* \* \*

"Question. Were there any assurances made to you which would justify the expenditures which you have made; and if so, who made those assurances?

"Mr. BUCKMAN. Absolutely so—that is, *in my opinion*, of course. I think, first, it was Lieut. Williams, after he had told me, or after we had been negotiating about this financing and about other things. I think I can recall almost the phrase of our conversation at his desk. I said, 'Of course, you can realize that the amount of money we have got to spend in equipping this thing is not justified by this \$36,900 order, and we expect to get the balance.' As near as I can remember, his reply was, 'You are the low bidder, and you will get the balance.'

"Question. You understood that of course meant provided that he himself got a requisition for it or the Government needed it?

"Mr. BUCKMAN. I understood that it was a definite assurance—that is, that remark coupled with all of the negotiations and conferences which had gone before between us—a definite assurance not only that we would get the orders if the orders were forthcoming—or the requisitions. As I understand it, the Procurement Division gets the requisitions and turns them into orders—not only *if* they were forthcoming, but they would be forthcoming. I think that is where the issues joined. But in my mind at that time and in my mind now, that was the question, and I think it was the question being discussed by the Ordnance Department and by the War Industries Board—in view of the fact that rutile is not a peace-time production, shall we finance the Buckman & Pritchard Company and give them all of this business—not four hundred and ten tons—but give them the rutile business, or shall we finance the American Rutile Company and give them the business; or, if there is enough business, finance them both and give them the business? The Government thought they saw ahead enough tonnage to give those two concerns, or one of them—I do not know what was in their minds—but that was the situation and that was the meeting of our minds in those discussions.

\* \* \* \* \*

"Question. You understood at that time that the procurement section had not received any requisitions for an additional amount of this rutile?

\* \* \* \* \*

"Mr. BUCKMAN. I did not understand that, although they had not received any requisitions, they had received assurances that there

would be further requisitions forthcoming as soon as a schedule could be got up.

\* \* \* \* \*

"Mr. BROWN. Were you familiar at that time with the alleged requirements of the Government for rutile?"

"Mr. BUCKMAN. *I had gotten a certain amount of data together. I can not say that I was familiar entirely; no one was. It was a new subject being developed, as I understood, by several men. My figures ranged from 1,200 to 2,000 tons per year of active campaigning—and we were expecting to get into active campaigning in the middle of the summer.*

"Mr. BROWN. From whom did you get that information that there would be required between 1,200 to 2,000 tons of this material a year?"

"Mr. BUCKMAN. Maj. Westcott, for one, in the board of control

\* \* \* \* \*

"Lieut. Col. WILLIAMS. Did they tell you those were actual requisitions they had received, or was it merely their estimate of what it would be?"

"Mr. BUCKMAN. *Those were their estimates; that is, that the Army officers who were to decide and in whose hands the decision lay, would say what was needed. In other words, they were the highest authorities that then existed on this subject. I do not mean those two men only; I mean the other trench warfare men.*

"Lieut. Col. WILLIAMS. You were proceeding, then, upon the basis of this four hundred and ten ton contract, expecting that you would receive further orders from the Government?"

"Mr. BUCKMAN. Upon the assurances that we would. If you please, I object to allowing that particular point to become clouded in my own mind.

"Lieut. Col. WILLIAMS. I want to get it clear in my mind.

"Mr. BUCKMAN. Yes, I understand; of course you do; and that is why I would like permission to elaborate a little on these replies. It was perfectly clear in my mind, and I think it was clear in the minds of the procurement officers that a large tonnage of rutile was forthcoming, and we would get these orders. There was a direct meeting of minds on that proposition.

"Lieut. Col. WILLIAMS. That they expected that the Government would need it?"

"Mr. BUCKMAN. *No one had anything except expectations; but upon those expectations they based assurances. Upon what they based their assurances, whether expectations or certainties, I do not know.*

"Lieut. Col. WILLIAMS. What I am trying to get at is this: If you looked around over the field and came to the conclusion that here is a field for lots of business, in my judgment, there is not going to be a loss of business here; they are going to need a lot of this stuff, and I believe it would be a good proposition for me to go ahead, although I have a small contract and spend a lot of money and get in shape to fill those needs and demands when they shall be made——

"Mr. BUCKMAN. That is certainly not the basis upon which this was gone into. We were not in position to do it, and the bank of Jacksonville, which loaned us a certain amount of money, and the

Titanium Alloy Co., which loaned us a certain amount of money, were assured by me—I ask you, please, to bear in mind that I was the man who was actually doing all of this. Mr. Meredith and other men connected with my company were in an official or advisory capacity. I was the man at the wheel, and it was I who assured the Titanium Alloy Co., and assured the banks, that we were going into this thing not as a gamble on the business but on assurances that this business would be forthcoming, and that if the war were to terminate there would be in this contract a cancellation clause which I thought would amply protect us. That is the basis I went into it on.”

There was other testimony by Mr. Buckman along the same line.

\* \* \* \* \*

“Lieut. LENT. \* \* \* At what time did you expect the Government to carry out these assurances which you state it gave you as to future orders? When did you expect to get these subsequent contracts that they promised you?”

“Mr. BUCKMAN. We expected to get them very shortly. That is, there were no assurances given me of a definite date at all. I was assured, however, that before the end of the year—I remember that—future orders would be forthcoming, because there was some question of the possibility of our being able to increase our production even beyond two tons a day, if those future orders were to come in, if they would overlap the estimated completion date of this order; but no one gave me any assurances of a definite date when these things would come forward.”

(c) Maj. W. H. Gelshanen testified as follows (transcript, p. 94 et seq.):

“Maj. GELSHANEN. The first time I heard of rutile was when the subject came up to our office and I went over to the trench warfare section and saw Maj. McPherson, who told me at that time that they would want large quantities; that the only source of production was the American Rutile Co.; and that he had been negotiating with them, and that he wanted it to convert finally into titanium-tetra-chloride. \* \* \*

\* \* \* The first time I heard of the possibilities of the Florida deposits was, I think, when Mr. Meredith came in and said they could produce rutile.

“Lieut. Col. WILLIAMS. What time was that?”

“Maj. GELSHANEN. I should say that was about the same time he is talking of—maybe February, 1918—that they had a deposit down there, or a method by which they could produce rutile. They were already producing ilmenite and all that they needed to do was to make a continuation of this process in order to make rutile, which was not being extracted at that time.

“Question. Did you understand that it was necessary to secure additional machinery and go through a different process in order to get that rutile?”

“Maj. GELSHANEN. I understood that it was necessary for them to continue their refining process. They were taking it up to a certain point in making ilmenite, and from that, by a further modification, they could extract rutile, but that they would have to put up certain machinery to make this further extraction.

"We then investigated the possibilities of their being able to do this and the first reports that we got were very favorable \* \* \*. I then decided to go ahead with them to see whether we could get production. About that time everybody else said that it was impossible and that they could not produce rutile. \* \* \*

"I then started negotiations with Buckman and Pritchard and they named us a price of \$90, as against, I think, about \$200, the contract with the American Rutile Company called for—I am not sure whether it is \$180 or \$200, but I think it was about \$200. The question was whether we had better go ahead and increase the American rutile or whether we had better go ahead and do this other proposition. Taking this big difference in price, and the fact that people to whom we had been referred said that they could do it led me to believe that we had better go ahead and give it a trial. We made a contract with them for 410 tons, because that is all that I had in front of me at the time I made the contract. Everybody said there was to be large quantities used. \* \* \*

"Question. Did you tell them you expected there would be large demands for it, or guarantee them large demands?

"Maj. GELSHANEN. *I did not guarantee it. I said I expected there would be, but at that moment I could only contract for 410 tons that had been requisitioned for—that I could only order what had been requisitioned.*

"Question. Did you undertake to assume any responsibility for larger orders to these people?

"Maj. GELSHANEN. Well, not any further than you would under those conditions—we were informed that they were going to want large quantities and that if they produced it—now, up to this time, Colonel, they had never produced any of this—but *if they produced it and there were those requests they would certainly get the business.*

"Question. What I am driving at, Major, is whether or not in this case there were any representations made to these people upon the face of which as a legal proposition they were justified in making expenditures in which they could hold the Government in case they did not get the orders contemplated.

"Maj. GELSHANEN. Well, there was no doubt but at the time the general impression throughout the Ordnance Department and other departments there was that large quantities of rutile was going to be wanted. The French Government wanted 700 tons and we wanted—it was alleged that we wanted it—but I explained to them that the only requisitions that I had that were definite were those that would allow me to contract for only 410 tons.

"Question. In other words, did these people go ahead and spend their money expecting to get additional business, or relying upon guarantees given to them by the Government that they would get the business?

"Maj. GELSHANEN. I can not tell that; that is a matter in their own minds. *I could not guarantee that they were going to get the business, because I did not have the business in front of me. It was clearly explained to them.*

"\* \* \* at that time the authorization for purchases was coming through what they called 'Controls Division,' of which General



Dickson was the head, so that if they saw General Dickson (but I do not remember anything they did before) they were at the fountain head of all authority as far as purchases were concerned at that period of time. However, there is no question but what there was large talk about the requirement of rutile. The War Industries Board was pushing us all the time, even after we made this contract, to put up additional machinery with the American Rutile Company. I was adverse to doing that until I saw what the probabilities were that these people were going to produce, because there was a question raised as to whether they would produce or not, and that was one of the reasons why I was so insistent all the time that they get going, because I wanted to know if they were not going to get started so that I could set up the American Rutile Company, which I was unwilling to do if these people were coming through, because I felt that the American Rutile Company was trying to take advantage of the situation.

"Lieut. LENT. So, the first thing necessary for them to do before you contemplated giving any future orders to them was to start production.

Maj. GELSHANEN. I do not know how that was discussed. In my own mind I would not have given them any further orders and tied myself up to them until they started to produce, because I would have placed it with the American Rutile Company who had produced.

"Lieut. LENT. I mean before you had requisitions for such orders come in during the next few weeks after this.

"Maj. GELSHANEN. You mean after the contract was placed, the next few weeks after that?

"Lieut. LENT. Yes.

"Maj. GELSHANEN. No; I would not have placed them.

"Maj. GELSHANEN. Colonel, there was a great deal of discussion, and it bears out what I said before to the people of their ability to produce. The War Industries Board or division thought it was not going to be produced. \* \* \* I was very desirous that these people should produce under that contract and get the stuff coming, if they were going to do so, because the giving to them of an additional contract would be contingent upon their ability to produce.

"Lieut. Col. WILLIAMS. Was the Government itself in any way undertaking to finance it?

"Maj. GELSHANEN. *Only to the extent of loaning them \$10,000 or \$11,000.*

"Question. Not undertaking to run it as a Government plant?

"Maj. GELSHANEN. *No, no; the Government had no control over it.*

\* \* \* \* \*

"Maj. GELSHANEN. The day that they got the contract they agreed that they would produce rutile at a rate of two tons per day in six weeks."

(d) Lieut. Edward A. Williams testified as follows (transcript, p. 110 et seq.) in regard to conferences with Messrs. Buckman and Pritchard:

"Lieut WILLIAMS. We had several conferences regarding their ability to produce rutile and also regarding the price of rutile, and

also how long it would be before they could produce under their contract. That was one of the main subjects.

\* \* \* \* \*

"He told me they could produce rutile. If I remember rightly, it was claimed that within six weeks after the signing of the contract they would be on a production basis. We figured it out and placed sufficient rutile with the other people to keep the converters going until such time as it was estimated that Messrs. Buckman and Pritchard could produce.

"Lieut. LENT. Why could they not produce sooner?

"Lieut. WILLIAMS. Because they needed new machinery.

"Question. And was there any mention made as to how this machinery to be purchased was to be financed?

"Lieut. WILLIAMS. At the time of the contract—that is, in the first application—I do not think there was. Later on it developed that they would need extra financing, and then the question was, How were we to secure the money for them?

\* \* \* \* \*

"I conveyed to Mr. Meredith, or endeavored to convey to him, the urgent need of the Government for rutile at that time, and also that the requirements would undoubtedly continue as long as the war, and so forth; that they would be urgent; they were at that time. It was common talk from other sources, although we had nothing definite on which to work.

\* \* \* \* \*

"Lieut. WILLIAMS. *I believe I said to Mr. Buckman and Mr. Meredith that they probably would receive other orders. There was no question at that time about there being others at that time. They were by far the lowest bid that we received.*

"Lieut. LENT. Was their receipt of such further orders to be contingent merely upon their low bid, or was it necessary for them to show something in the way of production?

"Lieut. WILLIAMS. Of course, they would have to show production first, and undoubtedly both plants would have been operated, although, of course, it would be entirely a matter of expediency.

"Question. What authority did you have in connection with the placing orders for those things bought through your division?

"Lieut. WILLIAMS. I believe the actual placing of orders was through Mr. Gelshanen. I had no authority.

"Maj. GELSHANEN. If I might interrupt, as a matter of fact, I had the responsibility but not the authority.

"Lieut. Col. WILLIAMS. Who had the authority?

"Maj. GELSHANEN. The contracting officer.

"Lieut. Col. WILLIAMS. MacRoberts?

"Maj. GELSHANEN. MacRoberts.

\* \* \* \* \*

"Maj. GELSHANEN. I assumed responsibility for the negotiations—I assumed all responsibility.

\* \* \* \* \*

"Lieut. LENT. Did they not ask you to put in the contract anything about taking care of the new machinery?

"Lieut. WILLIAMS. I do not think so; but it was understood that new machinery was to be procured by them.



"Lieut. LENT. Was it understood that the Government would have to procure it or that the petitioners were to procure it?"

"Lieut. WILLIAMS. I do not think the Government was to procure it.

\* \* \* \* \*

"Mr. BROWN. Now, regarding the question of business, did you not as a matter of fact convey the impression to Mr. Buckman that they would get a large quantity of business?"

"Lieut. WILLIAMS. *If it came through, I believed they would. I believe I did convey that to them.*

\* \* \* \* \*

"I knew it would require a certain amount of machinery, but just what I did not know."

\* \* \* \* \*

In a letter to this Board of June 14, 1919, Lieut. Williams said, among other things:

*"However, there were no definite promises given to Messrs. Buckman and Pritchard, and the increasing of their plant was based entirely upon their own opinion and patriotic motives."*

(e) Mr. R. M. Torrence (transcript, p. 126, et seq.), with reference to the War Industries Board financing the petitioner, said:

"Question. Was there any hesitancy about giving them the 30 per cent?"

"Mr. TORRENCE. On my part there was a decided hesitancy; yes; because I felt that they were not making good, and I did not feel that they would produce. I thought they could not make good from the reports I had on their plant and their equipment, and I was not willing to O. K. the recommendation until the amount asked for was guaranteed by an outside party, and Mr. Meredith showed his good faith by doing that. I felt the Government could not lose anything if they did give them that amount, consequently I approved it as far as the War Industries Board was concerned.

"Question. Was anything said at that meeting in regard to further orders of rutile?"

"Mr. TORRENCE. *Nothing that I heard. It was a question of getting what they had a contract for.*

\* \* \* \* \*

"Question. Did your committee have authority to promise future orders to any particular contractor?"

"Mr. TORRENCE. Not at all.

\* \* \* \* \*

"Mr. BROWN. Yes; there was a crying need for rutile at that time, is not that true?"

"Mr. TORRENCE. There was a demand for it which was very difficult to determine. The best of our knowledge we got from the people who were going to use it and they were very reluctant about saying how much they were going to use. I think about 4 tons a day was the biggest they ever thought they would possibly use. That would bring it up to 1,200 tons more or less for us, and 180 tons for the

French, which would make roughly about 1,400 tons, which figure I used in those letters."

\* \* \* \* \*

In an affidavit of August 12, 1919, and filed in this case, Mr. Torrence made the following statement:

*"I have no knowledge of any promises that may have been given to Messrs. Buckman & Pritchard as to placing with them further business than the tonnage covered by the contract."*

\* \* \* \* \*

"It might be fair to assume that had Buckman & Pritchard made satisfactory deliveries and had the war continued, also that rutile was still required, that this company might have been given additional tonnage."

#### DECISION.

1. The issues upon the claim presented are not clearly drawn in the petition, nor were they clearly stated by counsel at the hearing. From a careful examination of the case, however, in all its phases, it may be said that the petitioner's case is based upon two theories: (a) That the Government undertook to finance the petitioner's plant and facilities as an additional source from which to obtain rutile; and (b) that the Government agents assured the petitioner in the conferences which took place in March and April, 1918, that, in conjunction with the order for 410 tons of rutile, sufficient orders for that material would be given petitioners to justify the expenditures for machinery and facilities to go into production at 2 tons of rutile per day; and that in case of cancellation the methods provided in article 4 of the written contract should be applied in settlement.

2. In addition to a consideration of the petitioner's claims as based upon these two theories, this Board will also take cognizance of and proceed to determine the rights of petitioner under written contract No. P. 4430-1498 TW, for the 410 tons of rutile.

3. This case, so far as it is based upon the alleged verbal assurances, appears at first blush to come squarely in the teeth of the well-established doctrine that parties are conclusively presumed to have embraced their whole agreement in the written instrument in the absence of fraud, duress, or mutual mistake of fact; but taking for the moment the view most favorable to the petitioner, that the actual order for 410 tons was but the initial or first order, in pursuance of the alleged larger undertakings, we will proceed to discuss the case upon its merits.

4. The act of March 2, 1919, under which this claim is brought, provides that the Secretary of War may—

*"adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency, &c."*

The assurances alleged to have been made, then, must be of such a nature as to have constituted an agreement between the parties; that is, a meeting of the minds upon such definite understanding as to create a legal or equitable obligation on the part of the Government before the claim here presented can be maintained. This Board is of the opinion that there was clearly no such meeting of the minds of the parties as to create any liability whatever on the Government in this case, so far as the same is based upon the alleged assurances.

5. The loan by the Government to the petitioner of \$11,000, or 30 per cent of the face of the contract for 410 tons of rutile, was in no sense an effort or undertaking on the part of the Government to finance the petitioner's plants as a source of supply. All the evidence in the case clearly shows that this was merely a loan for the purpose of assisting the petitioner in the performance of its contract for the supply of the 410 tons of rutile. This loan was not advanced until after considerable investigation had been made as to the financial standing of the petitioner, and the petitioner's probable ability to fill the order for 410 tons, and was then made only on condition that Mr. Meredith and his Titanium Alloy Co. would jointly and severally guarantee the repayment of the money advanced. As a matter of fact the loan was deposited by the Government in the bank in Florida and the petitioner was required to make on each check drawn on that sum a certificate in the following words:

*"Funds realized on this check will be used solely to cover the cost of machinery and for labor in connection with the installation of said machinery necessitated for the fulfillment of War Order No. P. 4430-1498 TW."*

All the evidence of the case clearly bears out the finding that the financial assistance rendered by the Government was merely for the purpose of enabling petitioner to fulfill the obligation it had entered into for the 410 tons of rutile.

6. We come, then, to the question as to the assurances made. Were there such assurances as created any legal or equitable obligation whatever upon the Government as to payment for machinery or facilities by the petitioner? We are clearly of the opinion that there were not. It is admitted freely by all parties that at the time these negotiations were carried on by Messrs. Meredith and Buckman with Government agents, that it was understood and believed by all that in the then-existing conditions and the state of the war large amounts of rutile would be needed both by this Government and by those associated with it in the war. It may be admitted also that Government agents assured the petitioner that there was a great need for this material and that there would be in the future a great demand for it, but these assurances fall very far short of creating any legal or equitable obli-

gation on the part of the Government in this case to finance the petitioner in the operation of its plant. Mr. Meredith frankly admitted in the evidence that in the circumstances with this expected great need for rutile, that in the making of the expenditures upon the petitioner's plant he was guided solely by his own business judgment upon the expectancy of further business. There was perhaps no one connected with this matter who was in a better position, after his conference with numerous parties in Washington, than Mr. Buckman to form some independent judgment as to the needs or expected needs of the Government for rutile, because he discussed this matter with practically every person who was interested in ordering the same, and with a special view at that time of having the actual order for this rutile largely increased so as to secure thereby a larger advancement for financial assistance, but he was not able to find any person who was willing or had the authority at that time to give him an order for more than 410 tons of rutile. Mr. Buckman also admitted (see p. 11, statement of facts) that "no one had anything except expectations; but upon these expectations they based assurances." It is out of the question to contend that the Government would be liable for assuring parties that it needed material or equipment, without a definite agreement to have those parties supply those needs. It may be true that Mr. Buckman was under the impression that the statements made by the Government agents could be construed into an undertaking to take care of his plant in the event of expenditures made upon the faith of the further needs of the Government and upon the crystallization of those needs into orders, and that in the absence of such orders he would be entitled to compensation under the cancellation provision of the written contract; but no such construction can be placed upon those assurances, and petitioner's counsel at the hearing freely admitted that that may not have been a legal interpretation, and not the sort of an interpretation that he personally would have put upon it (transcript, p. 8).

7. There is considerable evidence to show, also, that the hope and expectation on behalf of Messrs. Meredith and Pritchard of getting other and additional orders for rutile, was not the sole, and may not have been the controlling, consideration for their making the large expenditures in the rehabilitating of the old plant and in the addition of new machinery. The old plant was shut down at the time the conferences were held with the Government agents, and was not being run because it could not be run upon a paying basis; and petitioner had already decided upon rehabilitating the plant and, indeed, had already purchased a large amount of machinery for that purpose, in order to put the plant in condition to operate it upon a paying basis in separating from its ore ilomite and other chemicals for which

there was, and still is, a considerable commercial demand. The separation of rutile is not a new and different process from that employed in separating ilemite and other commercial chemicals, but is an additional or continuing process after the separation of these commercial chemicals, and, while the expectation of receiving further orders for rutile may have actuated the petitioner in expending more than it would otherwise have spent in the purchase of particular machinery for this additional refinement in the separation of rutile, the petitioner clearly had in mind primarily the rehabilitation of the plant for the purpose of separating the commercial chemicals. In fact, notwithstanding the large expenditures which were made by petitioner—Mr. Buckman admitted (transcript, p. 79) that only 20 per cent of the expenditures were made for the particular machinery needed in the continuing process of the separation of rutile—and for which compensation is claimed under the alleged assurances, the plant is now being run upon a paying basis in the separation of ilemite and other commercial chemicals, although the plant is producing only 20 per cent of its capacity (testimony of Mr. Buckman, transcript, p. 80).

8. This is one of many cases that come before this Board in which persons, in expectation of future business, based upon the then existing conditions, have made expenditures relying upon their business judgment as to future orders, and have been disappointed because the war terminated and the demand and the necessity for the manufactured product has ceased. And this Board is therefore clearly of the opinion that, looked at from every point of view, there is no liability of any sort, either in law or equity, resting upon the Government in this case by virtue of any assurances, opinions, or representations made to the petitioner as to future orders for rutile, and the petitioner is not entitled to an award in any amount upon that claim.

9. This Board, however, from the examination of the evidence and papers filed in the case, sees no occasion to reverse the decision reached by the board of contract adjustment of Edgewood Arsenal, to the effect that the delay in the production of the rutile, under contract No. P-4430-1498 TW, was not due to any fault of the petitioner; and the Board finds that that was a binding contract upon the parties, and that the petitioner is entitled to all rights thereunder as set out in the contract, and that settlement should be made thereunder in accordance with its terms.

#### DISPOSITION.

A copy of this decision is, therefore, transmitted to the Claims Board, Chemical Warfare Service, for its information as to the con-

clusion herein reached in respect to the alleged assurances made for future orders for rutile other than that contained in written order No. P-4430-1498 TW; and for further action and recommendation to the Secretary of War of a fair and equitable basis upon which the said contract or order No. P-4430-1498 TW should be adjusted, paid, or discharged, in the manner set out in paragraph C, section 5, Supply Circular No. 17, War Department, revised March 26, 1919.

Col. Delafield and Maj. Farr concurring.



JUNE 3, 1920.

**Case No. 2099.**

*In re* **CLAIM OF EMPLOYEES OF THE MINNEAPOLIS STEEL & MACHINERY CO.**

- 1. JURISDICTION—ORAL PRESENTATION OF CLAIMS UNDER THE ACT OF MARCH 2, 1919—WORDS AND PHRASES.**—The act of March 2, 1919, contains no requirements that claims thereunder must be presented in writing. The word "presentation" means doing some act in the presence of another, and in the absence of express provision in the act for the presentation of claims in writing an oral presentation of a claim to the War Department prior to June 30, 1919, is a sufficient presentation within the meaning of said act.
- 2. NATIONAL WAR LABOR BOARD, PURPOSE AND AUTHORITY OF.**—The National War Labor Board was established for the purpose of insuring continuous production of war supplies by industrial peace throughout the country. The authority granted to the board under the presidential order of April 8, 1918, authorized it to give assurance to employees and employers as well that its findings would be enforced by the Government.
- 3. STRIKES.**—The right of employees to strike for higher wages is not questioned, and for the employees to refrain from striking is a valid consideration for a promise by representatives of the National War Labor Board so as to make the promise binding upon the Government.
- 4. AGREEMENT FOR WAGE ADJUSTMENT—NATIONAL WAR LABOR BOARD, OBLIGATION OF THE GOVERNMENT UNDER AWARD MADE BY.**—Where employees engaged in the production of war material are dissatisfied and threatening to strike for higher wages and representative of the National War Labor Board promise such employees that if they will not strike that the board will investigate and determine the matter of wages and that its findings will be enforced by the Government, there is an agreement within the meaning of the act of March 2, 1919, and if the National War Labor Board awards an increase of wages to such employees the Government is under obligation to pay such employees as were actually engaged upon Government contract work the difference between the wages received by them for such work and the wages so established by the National War Labor Board.
- 5. INTERVENTION BY OTHER CLAIMANTS SIMILARLY SITUATED.**—Where a claim is originally filed by officers of a trade union as agents for certain employees only for increased wages awarded by the National War Labor Board other employees affected by such award may intervene.
- 6. CLAIM AND DECISION.**—Claim for additional wages of employees under an award by the National War Labor Board under act of March 2, 1919. Held, an agreement within the meaning of said act, and not only the employees who have filed claims but others similarly situated may intervene and have their rights to additional wages under said award determined.

Mr. Bryant writing the opinion of the Board.



## FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, of 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On April 8, 1918, the President appointed the National War Labor Board by Executive order. Its duties were described as follows:

"The powers, functions, and duties of the National War Labor Board shall be to settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays, and obstructions in which might, in the opinion of the National Board, affect detrimentally such production; to provide, by direct appointment, or otherwise, for committees or boards to sit in various parts of the country where controversies arise and secure settlement by local mediation and conciliation; and to summon the parties to controversies for hearing and action by the National Board in event of failure to secure settlement by mediation and conciliation."

3. The board functioned in labor disputes in two different ways: If employers and employees agreed to arbitration by the board, a committee appointed by the board, after examination by the arbitrators and hearing the parties, issued an award which was binding upon the parties. If one side would not agree to submit to arbitration, the board, on request of the other side, would make an investigation and issue its finding on the facts.

4. The board was not nonpartisan. It was bipartisan. One-half its membership represented employers and the other half employees. Arbitration committees of the board were appointed from each half equally and in case a committee could not arrive at an agreement an umpire was chosen who rendered a decision from a nonpartisan standpoint.

5. The board maintained a force of partisan investigators who were sent out upon request to aid in preparation of a case from the point of view of the employer or of the employee, as the case might be.

6. The board also maintained a force of labor administrators who were sent to different points where trouble existed, to ascertain the facts and report to the board.

7. In the spring of 1918, representatives of the employees of the Minneapolis Steel & Machinery Co., of the St. Paul Foundry Co., and of the American Hoist & Derrick Co., made application to the War Labor Board, stating that there was unrest among employees: that wages needed adjustment; that production of war supplies on which the companies were engaged was being interrupted; that it

was difficult to keep the men at work, and asking an investigation by the board and a determination of what wage scale should be paid.

8. The attitude of the several companies concerned was, from the beginning, that no investigation or intervention was necessary and that there was no serious labor trouble and that they could adjust such as there was.

9. In May and June, 1918, the board sent representatives to look into the situation. The companies claimed that the board had no jurisdiction in the matter. After hearings and against the objection of the companies, the board decided to take jurisdiction.

10. The companies refused to submit to arbitration.

11. The primary purpose of the appointment of the War Labor Board was not to benefit employers or employees, but to insure the continuance of the production of war supplies by maintaining industrial peace so far as it could.

12. Mr. W. B. Angelo, assistant chief administrator of the War Labor Board, testified that when complaints were filed it was the practice and policy of the Board to "send out investigators in behalf of either, or both, the employer or the employee to aid them in the preparation of their case, and they all understood it was a part of their duty to keep the men at work and keep up the production in any event by giving them assurance that whatever remedy they were entitled to would be granted them, and that they were not warranted in striking to get the relief to which they thought they were entitled, as the Board would give them whatever the merits warranted and avoid the losses incident to a strike to achieve their end."

13. In early October, 1918, the Board sent Vernon J. Rose, an investigator, to Minneapolis. By the time Mr. Rose arrived a certain substantial portion of the men at least had become a good deal dissatisfied, uneasy, and disposed to strike. Mr. Rose conferred with attorneys representing the men, with officials representing various unions, and also addressed gatherings of men.

14. Mr. A. G. Abbey, a field representative of the International Association of Machinists, testified that he had had numerous conversations with Mr. Rose and heard him address the men on several occasions. At several meetings of the men, which Mr. Abbey had been instrumental in calling, Mr. Rose stated "how the National War Labor Board came into existence, the powers behind it, the way it functioned, and so forth and so on, and got into that in detail and went on appealing to them to stay at their work; that their case, their wants, would be taken care of through the proper channels of the United States Government; that they had brought into existence a tribunal for that purpose, and emphasizing not only at that particular time but at many other times that if they do stay at their work

and go after this in the proper manner, because if they got off the right routine or the proper routine they would merely damage their own chances of getting anything, and assuring them that they would have justice dealt to them through the United States Government." "I had become more or less skeptic, wanting to know almost the first thing from all of these men what power they had got behind them, and it would generally lead up, as it did in this case, to the power of the President of the United States, and he referred quite extensively to the Smith & Wesson case, as to where the Government had stepped in and taken hold, and intimating that the same condition would exist here if conditions warranted it, and leaving without any doubt a satisfied impression upon them that if they conducted themselves properly and in accordance with the recommendations of the Government that they would see that any award of the National War Labor Board would be lived up to as far as that company was concerned."

15. Mr. Abbey further testified that it was the assurances from the different men from the Government that kept the employees on the job.

16. Mr. Abbey's testimony was substantiated by a number of other witnesses who had met Mr. Rose when he came to Minneapolis, and had attended the meetings at which he spoke. It was further substantiated by a statement of Edwin Newdick, director of the War Department News Bureau, in a memorandum for the Secretary of War dated August 15, 1919, and filed with the records in this case.

17. Mr. Vernon J. Rose states as follows:

"I called the attention of the men to the Government's course of action in the Smith & Wesson case as indicating the Government's purpose during war time to see that the findings of the National War Labor Board were enforced and production sustained during the war \* \* \*. I urged them to remain at their work, calling their attention to the point \* \* \* that it gave them full ground for faith in their Government hearing their complaint and making a just and effective award if they remained at work."

18. Other individuals connected with the Government also addressed the men, notably Mr. F. F. Searing, of the United States Shipping Board, and F. O. Sessions, Chicago representative of the Shipping Board, but there was no evidence that the latter were acting under authorization from the National War Labor Board. The result, however, was to disseminate widely the statements of Mr. Rose and to create among the men the belief that if they stayed at work the arbitrators of the War Labor Board would establish a fair wage scale, and that the Government would see that payment of the wages at the rate fixed was enforced. The employees accordingly remained at work.

19. Messrs. William H. Taft and Frank P. Walsh were appointed as the section of the Board to deal with the matter. They shortly thereafter started an investigation, which lasted a number of months. On April 11, 1919, they handed down a finding granting a general increase in wages to take effect in the Minneapolis Steel & Machinery Co. as of October 1, 1918, and in the St. Paul Foundry Co. and the American Hoist & Derrick Co. as of October 24, 1918.

20. The companies in question had not submitted to an award by Messrs. Taft and Walsh, had not agreed to be bound by it, and, after it was handed down, refused to pay the wages awarded. After the refusal of the companies became known the men attempted to take steps to obtain their back pay.

21. In May, 1919, they requested the National War Labor Board to send an administrator to the district to see what could be done. Mr. Alpheus Winter was accordingly delegated, and he arrived in Minneapolis about June 1, 1919.

22. The companies refused to make any payments to the men, but undertook to act as paymaster if the Government chose to pay the back wages to the men.

23. In the early part of June, Mr. Winter sent a telegram to Mr. E. B. Wood, chief administrator of the National War Labor Board. Neither the original of this telegram nor a copy could be found. Mr. Winter stated that in substance it stated that he had learned that the Minneapolis Steel & Machinery Co. was willing to act as paymaster and recommended that funds be obtained for the payment of the men in the same manner as they were to be obtained in the case of the Bethlehem employees, which was then pending.

24. It is not necessary, however, to go into the question of the Bethlehem settlement, as it did not appear pertinent to the settlement of the present case.

25. Mr. Winter's telegram was received by Mr. Angelo, the assistant chief administrator of the Board, who was entirely familiar with the whole matter relating to the claims of the workmen at the three plants in question.

26. Mr. Angelo called up Mr. Payson Irwin, who was special assistant to the chief of the industrial service of the Ordnance Department. The industrial service section had been organized by the Ordnance Department to adjust labor disputes and to maintain industrial peace in connection with the contracts which were being performed for the War Department.

27. Mr. Angelo had several interviews by telephone, and personally, with Mr. Irwin some time about the middle of June, 1919. He testified that he "reminded him of the allegations made by the employees in this plant, that they had continued at work at a very low rate of wages under the assurances of the speakers from the War De-

partment and other departments of the Government; that any claim they might have for wages, hours, or working conditions would be adjusted by the Government, and that they had continued this work on those representations, and that now the finding of the Board bid fair to be inoperative, and it seemed to me that the good faith of the Government was at stake"; that he gave Mr. Irwin a general survey of the information that had been given him by representatives of the men, and conveyed in individual letters from the men, of which he received a large number. Mr. Angelo stated that if it were true that the men had been made promises that they should be kept.

28. Mr. Angelo further testified that, at the time of his interviews with Mr. Irwin he was satisfied from the reports which had come to him that promises had been made the men that if they stayed on the job the findings of the National War Labor Board would be enforced, and that one of the purposes of going to see Mr. Irwin was to place the responsibility of carrying out the agreement of the Government upon the proper official so far as he could. He stated to Mr. Irwin that the employees and their representatives claimed that they had been deceived and misled and that the Government had broken faith with them.

29. All the foregoing took place before June 15, 1919. Upon Mr. Angelo's request Mr. Irwin made an investigation to see if the War Department had any means of paying the men, and reported to Mr. Angelo that he did not see any way in which the War Department could pay them.

30. Written claim in the above matter apparently did not reach the War Department until August 8, 1919, when the Secretary of War received various communications from the Minnesota State Federation of Labor, and the Minneapolis Trades and Labor Assembly.

31. Since the original claim was filed a considerable number of men have appeared by counsel in the proceedings.

#### DECISION.

1. This case involves two main points. First, the question of whether presentation of the claim has been made before June 30, 1919, within the meaning of the act of March 2, 1919, and second, whether a contract, express or implied, has been established between the claimants and the Government.

2. This Board has never been called upon to decide whether a presentation under the act must be in writing or whether it could be made orally. It is clear in the present case that there has been no such presentation in writing. The presentation, if any, must be

found in the interviews between Mr. W. B. Angelo and Mr. Payson Irwin, held about June 15, 1919.

3. The situation at this time, in brief, was that the award of the War Labor Board had been handed down two months previous; that the workmen and the officials of the War Labor Board, which had made the award, were searching every possibility to accomplish the payment of the wages which had been awarded. The men felt that they had a just claim against the Government on account of what had transpired. They represented their grievances in their claim to Mr. Winter, the labor administrator, and Mr. Winter relayed it to Mr. Angelo, at Washington. Mr. Angelo, who himself believed in the justice of the claim and the responsibility of the Government, went forthwith to the agency through which he believed the Government's promises could be carried out—that is, to Mr. Payson Irwin, of the industrial section of the Ordnance Department, outlined adequately the claim of the men, and requested Mr. Irwin to find some means, if he could, of satisfaction of it.

4. It is not necessary to detail again the conversation, but we find that it amounted to a presentation of the claim to the War Department. It is true that both Mr. Winter and Mr. Angelo were employees of the Government. They had, however, been requested by the men to accomplish payment of the demand and there was no reason why, to the extent of presenting the demand to the proper source, they should not be considered to have acted as the agents of the men. Believing, as they did, that their department had been responsible for creating an obligation on the part of the Government, it was no breach of their duty to present this obligation at the proper source for satisfaction and, in so doing, to act as agents of the parties in whose favor they had created the obligation.

5. Nor do we find anything in the act which prevents an oral presentation from being effective. The word "presentation" varies in different connections and in common parlance has wide application. The presentation of a promissory note without accompanying written demand is sufficient to fix the obligation of all parties thereunder. It is true that the note is in writing, but the presentation need not be. The word "presentation" comes from a root which has no reference to the distinction between written and oral. If anything it leads rather to an assumption that there is to be no writing connected with it. A presentation is making something present to somebody else; that is, doing some act in the presence of another person. If Congress had intended to make written presentation a prerequisite to the jurisdiction of this Board, it would have been very easy and most natural to do so. In the absence of express provision under the act, we believe that writing is not necessary. We find, therefore, that the



claim was properly presented to the War Department before June 30, 1919.

6. The National War Labor Board was established for the purpose of insuring a continuous production of war supplies by securing industrial peace throughout the country. An essential part of its activities was to prevent interruption of production during the period necessary for the Board to function in any particular case. Its employees were properly instructed to keep the men on the job until the Board could make its finding.

7. Shortly before the statements alleged to have been made by the agents of the War Labor Board the War Department had so far supported the findings of the War Labor Board as to commandeer a large plant. It was common belief that the Government would take every means within its great war powers to enforce the decrees of its Board which had been appointed with such important duties. The usefulness of the Board would have been reduced to a minimum if employer and employee alike had not felt that it had behind it the full weight of Government power. The evidence justifies the conclusion that the officials of the War Labor Board gave assurance that its finding would be enforced.

8. In giving such assurances we find that the Board was acting within the powers granted it by the Executive order of the President and for the purposes of the War Department.

9. We have already held in the case of the Shannon Copper Co. that agreements entered into by the President's Mediation Commission were such as come within the terms of the act of March 2, 1919. The National War Labor Board was a similar agency.

10. Relying on the assurance of the Government, the claimants remained on the work instead of striking. The right to strike for higher wages, even when the country is in the throes of war and the lives of many soldiers at the front may be dependent upon a continuance of work, has never, so far as we know, been questioned. To refrain from striking may therefore be a valid consideration for a promise.

11. We accordingly find that the agreement alleged by the claimants has been established, and that the employees in question are entitled to receive the difference between the wages actually received by them and the wages which would have been received had the findings of the National War Labor Board of April 11, 1919, been carried out. This would be limited to war contracts—that is, to laborers working upon contracts with the Government for supplies necessary in the prosecution of the war—and would apply so far only as their labor was actually upon such contracts.

12. The present claim was originally filed by the officers of a trade-union acting as agents of certain workmen. Subsequently numerous

individuals have intervened. If there are other persons entitled, they may also intervene. This Board will issue a general decree stating the contract and the parties entitled may appear, receive the amount due them, and formally indicate their acceptance of the award.

DISPOSITION.

1. This Board will cause the amount due to the claimants to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division, and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimants, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Howe concurring.

JUNE 4, 1920.

**Case No. 1534.**

*In re* **CLAIM OF CENTRAL ENGINEERING CO.**

- 1. AGREEMENT TO COMPLETE CONTRACT BEFORE CONTRACT TIME—CONSIDERATION.**—Where the claimant had a formal contract to do certain construction work for the Government within a specified time, and where an agreement was made on the part of the Government to pay claimant extra remuneration if contract was completed in less time than stated in the contract, such agreement is based upon a valuable consideration and binding upon the Government.
- 2 CLAIM AND DECISION.**—This claim for \$15,061.47 arises under the act of March 2, 1919, under an alleged informal agreement. Held, claimant is entitled to recover.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$15,061.47, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant entered into a formal contract with the Government, dated May 12, 1917, through Col. George W. Burr, commanding officer of the Rock Island Arsenal, under the terms of which it was to do certain construction work consisting of excavation and concrete work, and also additional minor work relating to the installing of machinery for generating electrical energy.

3. Briefly, the provisions of this contract were to the effect that the work to be done by this contractor should be begun within seven days after the Government notified the contractor that it had finished certain preliminary work which the Government was to do, and which it was necessary should be finished before the contractor could begin upon the work covered by his contract; the contract price was fixed and based upon a unit price for the work to be done; it also provided that the work should be finished within 200 working days after it was begun, unless the excavation required exceeded the amount thereof as estimated at the time the agreement was made, in which event the time for performance thereof was to be extended proportionately, the number of additional days to be allowed to be fixed by the commanding officer at Rock Island Arsenal.

4. The contract was let about a month after the entry of the United States into the war, at a time when conditions, as they were found later to exist, were not clearly visualized. Shortly thereafter, with the commencement of numerous Government activities in connection with the work, the problem of dealing with labor became acute. The Government placed large contracts to be performed in the vicinity of this work upon a cost-plus basis. Contractors at once entered into competition with each other to obtain workmen, being ready to pay any rate of wages which the Government officials would approve. This involved the claimant in difficulties which it had not foreseen in calculating the fixed price upon which it had been willing to take the contract.

5. The problem of fixing a wage scale for work in this vicinity fell upon Gen. (at that time Col.) George W. Burr, the officer who had signed the claimant's contract in behalf of the United States. The contract required the contractor to complete the work within 200 working days, subject to extension in case an unexpected amount of solid rock or other material should be encountered. What constituted a working day was to be ultimately determined by Gen. Burr.

6. Owing, however, to the pressing necessity of having the work completed as rapidly as possible, Gen. Burr practically discarded the test for time of completion fixed in the contract and urged upon the contractor the completion of the work within the shortest possible time. He directed the contractor to use two or three shifts of men if necessary, to work men overtime, to work on stormy days which might, under ordinary circumstances, have not been considered proper working days and on which work could not economically be carried on, and otherwise urged the claimant to take every means practicable to bring the work to completion.

7. The claimant, shortly after it started the work, found itself in difficulty because its workmen were leaving to go to other more remunerative jobs. Its representative called on Gen. Burr to state its situation. Gen. Burr directed the claimant to pay such wages as should be necessary to meet the competition in the vicinity, and to work men overtime, both for the purpose of hastening the work and for the purpose of retaining them on the job.

8. The claimant also stated to Gen. Burr that raising the wages of the men, working them overtime, and working in two or three shifts and in stormy weather would cause a loss to the claimant under its fixed-price contract. Gen. Burr directed the claimant to proceed in the manner designated and informed it that the Government wanted the plant as quickly as possible and that the claimant's objective should be to finish the work. He further stated that, after the work was over, the claimant might put in a claim and it would be given "fair consideration." Gen. Burr stated in his testimony, in explana-

tion of his words, that he was doubtful of his power to increase the contract price, but that he had in mind that "if there was any legal justification, or any way could be found that these people should be brought out whole," it ought to be done because he knew they were losing money on the contract.

9. The claimant completed the work, as appears by the record of the Rock Island Arsenal, in 273 working days. It further appeared that the proper authorities at the arsenal extended the original 200 days by 73 days, as provided in the terms of the contract, on account of excess over contract estimation in the volume of the work. It thus appeared by the records that the contractor had completed its contract in exact contract time.

10. The claimant alleges as a result of its conversation with Gen. Burr a contract to reimburse the claimant to the amount of expense caused to it by reason of increases in the wage scale, approved from time to time by Gen. Burr, for work in the vicinity of the Rock Island Arsenal, and also reimbursement for certain sums paid for overtime in connection with the work.

#### DECISION.

1. So far as the facts in the present case show merely that conditions changed between the time the contract was signed and the time for performance, so that the cost to the contractor of carrying out its contract increased, we decide that the fact that the Government had been, in a way, instrumental in the increase of cost by reason of letting cost plus contracts in the vicinity, or by reason of other governmental activities in connection with the war, is not sufficient to entitle the contractor to increased remuneration.

2. It appears, however, in the present case, that much of the additional expense was incurred by the claimant at the request of the contracting officer for the purpose of completing the work in the shortest time possible, and was not necessary in complying with the terms of the contract. It is true that, according to the records at Rock Island Arsenal, the claimant's contract was completed just in contract time. The evidence of the contracting officer that the work was carried on in stormy weather, in two and three shifts and by means of overtime, is sufficient to make us believe that, notwithstanding the record of the Rock Island Arsenal, the contractor performed the work in less time than it would have been entitled to take under the strict terms of its contract. The very fact that the 273 working days elapsed at the exact minute when the last of the claimant's workmen left the finished job, leads us to the belief that the record as to the number of working days elapsed is not the result of a scientific and careful determination of fact, but rather a general certificate that the

work had been performed within contract time. It is in evidence that the contractor did many things involving increased expense which it was not required to do under its contract.

3. The evidence of a promise on the part of a Government official is not explicit, but we think that Gen. Burr's language was sufficient to indicate, and did indicate, in so far as he was authorized, in behalf of the Government, a promise of increased reimbursement for the increased exertions of the claimant. We find that, within the meaning of the act of March 2, 1919, Gen. Burr was authorized to promise increased remuneration, and that this promise of increased remuneration was met by a valid consideration, rendered by the claimant, to wit, its efforts to perform the contract ahead of contract time.

4. We find that the claimant is entitled to recover such expense as it can show was incurred, over and above the necessary expense of performing its contract, in compliance with directions of Gen. Burr for the purpose of performing its contract ahead of contract time.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C to the Ordnance Claims Board, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Lieut. Col. Junkin concurring.



JUNE 9, 1920.

Case No. 2069.

*In re* CLAIM OF MARLIN-ROCKWELL CORPORATION.

1. **LABOR DISPUTES—ADJUSTMENT OF PRICE.**—Where claimant at the instance of the Government representatives wrote to the Secretary of War agreeing to submit future labor disputes to arbitration by him or his representative on the understanding that if labor costs should be increased by any award there would be a corresponding increase in the prices of articles then under contract, which letter was acknowledged by the Secretary of War, and where disputes subsequently arose and were adjusted in accordance with the above arrangement and the arbitrator found that claimant was entitled to a corresponding adjustment of contract prices, held that there was an agreement within the meaning of the act of March 2, 1919, applicable to all contracts held by claimant at the time of the award not containing labor-dispute clauses. Held, further, that as to contracts containing labor-dispute clauses the rights of the parties are governed by such clauses.
- 2 **CLAIM AND DECISION.**—Claim for \$56,501.13, in part, under the act of March 2, 1919, and in part under G. O. 103 for increased labor costs, based upon an informal agreement as to the first part of the claim and two validly executed contracts as to the second part of the claim. Held, claimant is entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises in part under the act of March 2, 1919, Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1919, by reason of an informal agreement alleged to have been entered into between the claimant and the United States.

2. In part the claim is presented in accordance with General Order No. 103, War Department, 1918, having been referred to this Board by the Bridgeport district claims board under date of September 23, 1919.

3. The claimant is a manufacturer of munitions. In November, 1917, it was engaged in the performance of certain contracts entered into with the Government. It was expected that future contracts would be made with the claimant.

4. On or about November 15, 1917, Maj. Samuel J. Rosensohn, Judge Advocate General, an assistant to the Secretary of War, at the

request of the Secretary, held a conference with the representatives of the claimant company, in which he urged the claimant to modify its contracts with the Government by providing for the submission of labor disputes for settlement to the Secretary of War.

5. Pursuant to the above request the claimant on November 20, 1917, addressed a letter to the Secretary of War, parts of which material to the present case were as follows:

"We recognize the problem which confronts you in securing continuous and accelerated production of munitions of war, and we desire to share every responsibility that may be yours in connection therewith.

"The labor conditions in the small-arms and ammunition manufacturing industry in Connecticut at present are most satisfactory.

\* \* \* \* \*

"However, we recognize in the present crisis the necessity of continuous production under all conditions, and should difficulties arise which threaten to delay or diminish the production of our factories and a prompt settlement of such difficulties become necessary in the interest of the Government, we shall be glad to have, and hereby agree to have, the Secretary of War settle such difficulties in such manner as he deems proper.

"Since the contracts made with the Government are based upon existing wage conditions, it is understood that compensatory adjustment shall be made in the price of articles called for in the contracts in case of any change in wages.

"Our contracts for machine guns are made upon the understanding above."

6. Under date of November 21, 1917, the Secretary of War replied by letter, which we quote, as far as material, as follows:

"On behalf of the Government of the United States I desire to express to you appreciation of the public spirit which prompts your offer of cooperation with this department. Should the occasion arise when it shall be necessary in the interest of the Government for me to exercise the powers which have been vested in me by your communication of November 20, 1917, it will be done with a full appreciation of the conditions of your industry and of the problems with which you are confronted. I shall endeavor at such time to give you every opportunity to present such matters as you may deem necessary for a proper determination of any question which I may be called upon to decide."

7. About the middle of October, 1918, trouble developed between the claimant and its operatives.

8. On October 23, 1918, claimant informed the Secretary of War that demands had been submitted by its employees in a letter which read as follows:

"Inclosed please find demands submitted by the employees of Rockwell-Drake Corporation at Plainville, Conn.

"We hereby offer these demands for your consideration and agree to abide by your decision. We propose to put before you similar problems existing at other of our plants; in due course will submit these to you.

"Yours, very truly,

"MARLIN-ROCKWELL CORPORATION,

"ALBERT NEWCOME,

"*Secretary and Treasurer.*"

9. Two days later the employees of the claimant company wrote the Secretary of War, under date of October 25, 1918, requesting arbitration by the Secretary and agreeing to abide by the decision rendered by him or his duly authorized representative.

10. Maj. B. H. Gitchell was appointed arbitrator under date of October 29, 1918, by order of the Secretary of War, as follows:

"I hereby appoint Major B. H. Gitchell, U. S. A., as sole arbitrator to settle the labor disputes existing at the plants of the Marlin-Rockwell Corporation, of New Haven, Conn., and Norwich, Conn., and the Rockwell-Drake Corporation, of Plainville, Conn., pursuant to agreement referring such disputes to the Secretary of War or his duly authorized representative for adjustment by the companies and by the workers through their duly authorized representatives."

11. Maj. Gitchell thereupon proceeded to New Haven and held a conference with the officials of the claimant company, at which the officials of the claimant agreed to accept Maj. Gitchell as the arbitrator appointed by the Secretary of War in accordance with the letters of November 20 and 21, 1917, hereinbefore quoted.

12. Under date of October 31, 1918, the claimant confirmed the understanding by letter, as follows:

"Capt. C. E. FITZPATRICK,

"*Ordnance Dept., U. S. A., Boston District Ord. Office,*

"*19 Portland St., Boston, Mass.*

"DEAR SIR: Confirming our understanding reached at recent conference with the officials of the corporation in New Haven, we hereby agree to abide by the decision of the representative of the Secretary of War covering any difficulties or disputes with our employees in the plants of the corporation at Norwich or New Haven, Conn.

"Yours, very truly,

"LOUIS E. STODDARD,

"*Vice President.*"

13. On November 1, 1918, Maj. Gitchell handed down his award, which granted certain increases in wages to the claimant's employees.

14. On November 13, 1918, the claimant made application for compensation to it on account of increases in wages made by Maj. Gitchell's award.

15. Under date of November 20, 1918, Maj. Gitchell issued the following supplement to the award dated November 1, 1918:

Supplement to the award dated November 1, 1918.

Marlin-Rockwell Corporation.

Rockwell-Drake Corp., Plainville, Conn.

Marlin-Rockwell Corp., New Haven, Conn.

Marlin-Rockwell Corp., Norwich, Conn.

"Whereas under the agreement made between the Marlin-Rockwell Corporation and the Government it was agreed that where disputes shall be submitted by the manufacturer to the Secretary of War or to his duly authorized representative, and by the award duly made settling such disputes the contractor is required to pay labor costs higher than those prevailing in the performance of the contract price to such settlement, the Secretary of War or his representative may direct that a fair and just addition to the contract be made therefor;

"And whereas the Marlin-Rockwell Corporation has duly submitted the dispute to the undersigned as representative of the Secretary of War, for settlement, and by the award made in the settlement of the dispute the labor cost of the said Marlin-Rockwell Corporation has been increased;

"It is directed as a part of the adjustment made by me that a fair and just addition to the contract price shall be made therefor, to the extent of the actual increased cost upon proof by affidavit of the actual amount of increased cost.

"It is further certified that the Marlin-Rockwell Corporation has in all respects lived up to the terms and conditions of the contract, and that to the extent to which it has not done so such breach for this purpose only.

"By order of the Secretary of War.

"B. H. GITCHELL,  
*Major, U. S. A.*"

16. At the time of the arbitration and award the claimant had in course of performance a number of contracts with the Government.

17. One of these contracts, dated October 9, 1917, No. P16165-2683Sa, contained the so-called labor-dispute clause in the following items:

"ARTICLE XVII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be

made therefor: Provided, however, That the Secretary of War or his representative shall certify that the contractor has in all respects lived up to the terms and conditions of the contract or shall waive, in writing, for this purpose only any breach that may have occurred.

"If such settlement reduces such labor cost to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

"No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement.

"Every decision or determination made under this article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto.

"NOTE.—Provisions recommended by War Labor Policies Board and prescribed by order of Secretary of War dated August 30, 1918."

18. Under date of February 14, 1918, claimant received procurement order No. P29380-1220Sa covering the manufacture of spare parts for Colt-Browning machine guns, which order contained a clause relative to labor disputes, as follows:

"8. The price to be paid for this material and the terms of the contract to be entered into shall be determined by an agreement between the United States representatives and yourselves.

"(a) It is further stipulated and agreed that the formal contract to be entered into covering the material ordered herein shall contain the following clause: 'If, as a result of the settlement of labor disputes by the Secretary of War, or as a result of any present or future Executive order of the President of the United States, the contractor is required to pay labor costs higher than those theretofore prevailing in the performance of this contract, a fair addition to the purchase price of the articles shall be made therefor; but if such settlement or such Executive order reduces the labor costs of the contractor, a fair deduction shall be made from the purchase price, all as may be determined by the contracting officer. No claim for addition or deduction on account of increased costs due to such settlement or such Executive order shall be allowed unless the same has been ordered in writing and actually put into effect.'"

19. Other contracts, procurement orders, or other orders upon which the claimant was engaged contained no reference to labor disputes.

#### DECISION.

1. The rights of the claimant in respect to its contract, No. P16165-2683Sa and procurement order P2938-1220Sa, containing labor dispute clauses should be governed by the language of such clauses.

2. Without attempting to make detailed findings of fact, we think it is sufficient to state that we find that all the contingencies have happened, and that the provisions have been complied with in connection with contract P16135-2683Sa and procurement order P2938-1220Sa

so as to entitle the claimant, under the labor-dispute clauses just quoted to a fair and just addition to the prices set out in said contract and procurement order, sufficient to reimburse the claimant for such increased labor cost as it was compelled to pay in the performance of said contract and procurement order by reason of the award of November 1, 1918.

3. In connection with other contracts, procurement orders or other orders, in the performance of which the claimant was engaged at the time of the arbitration and award, we find that the claimant and the Government entered into an agreement whereby in consideration of the agreement of the claimant to submit the said labor dispute to arbitration by the Secretary of War the Government agreed to make compensatory adjustment in the price of articles called for in the contracts, purchase orders, or other orders which the claimant was then engaged in performing in case of any change in wages. We find that there has been a change in wages caused by the arbitration and award hereinbefore referred to; that the claimant has in all respects fulfilled its part of the agreement, and that it is entitled to compensatory adjustment as indicated.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action in connection with the claimant's contract, No. P16165-2683Sa and procurement order P2938-1220Sa, in accordance with this decision.

2. The Board will make and transmit a statement of the nature, terms and conditions of the informal agreement herein found and certificate C to the Ordnance Claims Board for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Thomas concurring.



JUNE 10, 1920.

**Case No. 1897.**

*In re* **CLAIM OF THE J. G. WHITE ENGINEERING CORPORATION.**

1. **TRADE DISCOUNTS.**—Under a cost-plus contract, which required the contractor to take advantage of trade discounts, failure to take advantage thereof can not be charged against the contractor when it was the fault of the Government; but when it is the fault of the contractor they may be so charged.
2. **PAY-ROLL DEDUCTIONS.**—Where claimant's system of accounting was deficient and meals were not properly charged against employees the claimant must bear the loss and not the Government.
3. **GOVERNMENT OPTION.**—Where the contract provides that the Government had the right to purchase the equipment it was not bound to do so and refusal to purchase old bicycles was proper.
4. **FUNERAL AND HOSPITAL EXPENSES.**—Such expenses for employees are not proper charges under a cost-plus contract.
5. **MISCELLANEOUS CHANGES.**—Claims for lawyer's fee and miscellaneous supplies disallowed and claims for excavator rental allowed.

Mr. Williams writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

This case arises under G. O. 103, War Department, 1918, and comes to this Board as an appeal from the Air Service Claims Board disallowing items aggregating the sum of \$5,809.74 alleged to have been expenditures made by the petitioner in performing work under a cost-plus contract in the construction of a concentration camp at Morrison field, in the vicinity of Newport News, Va., for which disbursements, it is alleged, reimbursement should be made by the Government under the terms of the contract for the work. The facts and circumstances of the case are as follows:

1. Under date of September 10, 1917, the J. G. White Corporation entered into a validly executed contract with the United States (by Lieut. Col. C. G. Edgar, Signal Corps, contracting officer) by which the petitioner undertook to do all things necessary for—

“the construction of a concentration camp in the vicinity of Newport News, Va., including clearing, grading, drainage, sewerage, water supply, electrical distribution, railroads and sidings, 24 warehouses, 27 mess halls, 27 barracks, 2 officers' quarters, 1 administra-

tion building, 1 garage, 1 commanding officer's quarters, and 1 guard-house, all as indicated on drawing Job 809, sheet 87, prepared by Mr. Albert Kahn, dated September 1, 1917."

This construction work was to be done upon what is commonly called a cost-plus basis, and the contract for the work contained the following stipulations with respect to the reimbursement to be made by the Government to the petitioner for expenditures made in the progress of the work:

**"ARTICLE II.**

*"Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) All labor, material, machinery, hand tools not owned by the workmen, supplies and equipment, necessary for either temporary or permanent use for the benefit of said work; but this shall not be construed to cover machinery or equipment mentioned in section (c) of this article. The contractor shall make no departure from the standard rate of wages being paid in the locality where said work is being done, without the prior consent and approval of the contracting officer.

"(b) All subcontracts made in accordance with the provisions of this agreement.

"(c) Rental actually paid by the contractor, at rates not to exceed those mentioned in the schedule of rental rates hereto attached, for construction plant in sound and workable condition, such as pumps, derricks, concrete mixers, boilers, clam-shell or other buckets, electric motors, electric drills, electric hammers, electric hoists, steam shovels, locomotive cranes, power saws, engineers' levels and transits, and such other equipment as may be necessary for the proper and economical prosecution of the work.

"Rental to the contractor for such construction plant or parts thereof as it may own and furnish, at the rates mentioned in the schedule of rental rates hereto attached, except as hereinafter set forth. When such construction plant or any part thereof shall arrive at the site of the work, the contractor shall file with the contracting officer a schedule setting forth the fair valuation at that time of each part of such construction plant. Such valuation shall be deemed final, unless the contracting officer shall, within five days after the machinery has been set up and is working, modify or change such valuation, in which event the valuation so made by the contracting officer shall be deemed final. When and if the total rental paid to the contractor for any such part shall equal the valuation thereof, no further rental therefor shall be paid to the contractor and title thereto shall vest in the United States. At the completion of the work the contracting officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor.

"Rates of rental as substitutes for such scheduled rental rates may be agreed upon in writing between the contractor and the contracting officer, such rates to be in conformity with rates of rental charged in the particular territory in which the work covered by this contract is to be performed. If the contracting officer shall furnish or supply any such equipment, the contractor shall not be allowed any rental therefor and shall receive no fee for the use of such equipment.

"(d) Loading and unloading such construction plant, the transportation thereof to and from the place or places where it is to be used in connection with said work subject to the provisions hereinafter set forth, the installation and dismantling thereof, and ordinary repairs and replacements during its use in the said work.

"(e) Transportation and expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work, procuring labor, and expediting the production and transportation of material and equipment.

"(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work. In case the full time of any field employee of the contractor is not applied to said work, but is divided between said work and other work, his salary shall be included in this item only in proportion to the actual time applied to this work.

"(g) Buildings and equipment required for necessary field offices, commissary, and hospital, and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage, etc.

"(h) Such bonds, fire liability, and other insurance as the contracting officer may approve or require, and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as hereinafter provided.

"(i) Permit fees, deposits, royalties, and other similar items of expense incidental to the execution of this contract, and necessarily incurred. Expenditures under this item must be approved in advance by the contracting officer.

"(j) Such proportion of the transportation, traveling, and hotel expenses of officers, engineers, and other employees of the contractor as is actually incurred in connection with this work.

"(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work. When such an item is allowed by the contracting officer, it shall be specifically certified as being allowed under this paragraph.

"The United States reserves the right to pay directly to common carriers any or all freight charges on material of all kinds, and

machinery, furnished under this contract, and certified by the contracting officer as being for installation or for consumption in the course of the work hereunder; the contractor shall be reimbursed for such freight charges of this character as it shall pay and as shall be specifically certified by the contracting officer; but the contractor shall have no fee based on such expenditures. Freight charges paid by the contractor for transportation of construction equipment, construction plant, tools and supplies of every character, shall be treated as part of the cost of the work upon which the contractor's fee shall be based; provided that charges for transportation of such construction equipment, construction plant and tools over distances in excess of five hundred miles shall require the special approval of the contracting officer.

"No salaries of the contractor's executive officers, no part of the expense incurred in conducting the contractor's main office, or regularly established branch office, and no overhead expenses of any kind, except as specifically listed above shall be included in the cost of the work.

"The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor.

"All revenue from the operations of the commissary, hospital, or other facilities or from rebates, refunds, etc., shall be accounted for by the contractor and applied in reduction of the cost of the work.

#### "ARTICLE IV.

"*Payments.*—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) The cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent ( $3\frac{1}{2}\%$ ), except as herein otherwise provided, of the sum of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any items or item entering into such statements upon which the contractor and the contracting officer can not agree, the decision of the contracting officer as to such disputed items or item shall govern. The contracting officer shall then transmit to a Signal Corps disbursing officer a copy of said statement together with original pay rolls, invoices and other necessary papers relating thereto and said disbursing officer shall, as soon as may be practicable, pay to the contractor the cost of the work mentioned in (1) and the fee mentioned in (3) of such statements, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding three and one-half per cent

(3½%), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals for the purpose of enabling the contractor to take advantage of discounts at intervals between the dates above mentioned or for other lawful purposes. Upon final completion of said work and the execution by the contractor of a release forever discharging the United States of and from all manner of debts, claims and demands whatsoever arising under or by virtue of this contract, the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof.

#### “ARTICLE XIV.

*“Settlement of disputes.*—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the Chief Signal Officer for determination. If, however, the contractor shall feel aggrieved by the decision of the Chief Signal Officer, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto.”

2. From an examination of the above-quoted terms of the contract it will be observed that the Government was standing the entire expense of this work, but that the petitioner was required to make payments for labor and materials, etc., and where such expenditures were properly made in accordance with the terms of the contract and evidence of the kind agreed upon was submitted, it was the duty of the Government to make reimbursement for such expenditures to the petitioner. The work at Morrison field was begun in due time, and disbursements were made by the petitioner for all labor and materials and other costs and were properly reimbursed to the petitioner by the Government, except the items making up this claim, which were disallowed by the Government auditors on the job, the action of the auditors being approved by the Claims Board of the Air Service; and as a result of such action on the part of the Air Service Claims Board this case was brought before this Board for determination. The facts in connection with each one of the items, or groups of items, disallowed will be discussed in connection therewith in the decision.

#### DECISION.

1. Group No. 1.—Discount deductions, \$2,490.15. A clause in Article II of the contract under which this work was being done provided as follows:



"The contractor shall take advantage to the extent of its ability of all discounts available, and when unable to take such advantage shall promptly notify the contracting officer of its inability and its reasons therefor."

Under this clause of the contract it was clearly the duty of the petitioner to use every reasonable and ordinary means to secure all available discounts upon bills for material, whether those discounts appeared upon the face of the bill or not. In cases where the discount did not appear upon the face of the bill, whether the discount was available or not depended upon whether or not it might have been secured if it had been seasonably asked for. There was an effort on the part of petitioner to show that at some time after the beginning of the work there was an informal understanding between the Government officers and the petitioner's auditors that all five copies of the invoices would be turned over to the Government auditors upon their receipt, and that no action would be taken by petitioner until the actual receipt of the material, and then it would be checked up and a material receipt furnished to the Government auditors, and when this was checked up and approved the invoices would be returned to petitioner for payment; and it is alleged that by virtue of this understanding many of the discounts herein claimed for were lost. Such an arrangement was, of course, greatly in the interests of the petitioner, both in the way of making it unnecessary to pay for material until it had been actually checked up upon its receipt, and in also reducing the time between payment by the petitioner and the receipt of reimbursement from the Government, and no doubt such an arrangement was highly satisfactory to the petitioner. We do not think it merits consideration in the circumstances of this case. It was the duty of petitioner to pay the bills, if in paying them a discount could be secured, even before the receipt of the material. And it is certain that any informal arrangement that was made by petitioner with the Government officers in respect to the matter of handling invoices and checking material should not operate to the distinct disadvantage of the Government in the loss of valuable discounts upon bills which should have been paid.

Not only is this true, but the evidence shows that shortly after it is alleged that such an arrangement had been made distinct instructions were received from Washington by the petitioner that all available discounts should be taken advantage of and that, if need be, materials should be paid for before they were received, in order to secure such discounts. Not only this, but the evidence shows that there were a great many items of discount lost during the early period of petitioner's operations which were taken up by the Government auditors with Washington, and where it was shown that such loss was not distinctly and directly the fault of the petitioner,



these discounts were allowed; so that it must be understood in the consideration of this question of discounts here presented that there were many items of discount in dispute and that many of these disputed items, after careful consideration by the auditor on the job and familiar with the circumstances, were allowed, and the claim for discounts here presented represent the items for which no justifiable reason could be found for allowance upon the part of the Government. The evidence is to the effect that, outside of possibly \$4 or \$5 in discounts, which is so small a matter as not to occasion serious consideration, all of the items of discount here claimed for were such as the contractor might have taken advantage of by the use of reasonable and ordinary means, and they should be disallowed.

2. Group No. 2—Pay-roll deductions, \$1,475.89. Practically all of the items making up this claim are deductions from the pay of the men on account of meals furnished to them. The Government was feeding men at this work, and it was the duty of petitioner to indicate upon the pay roll in some fashion the amount to be deducted from the man's pay for the meals that he had eaten so that the Government could thereby properly deduct from what pay was going to the man the amount that had been advanced in the way of meals. The system which petitioner had adopted of checking up the men who ate at the Government expense was admittedly inefficient, so that hundreds of men passed into the tents, ate their meals, and were never charged with them upon the pay rolls, and when these pay rolls came before the Government auditors for check deductions were made.

Government officers made test checks of the method adopted by petitioner for charging the men with meals that they had eaten, and the Government officers became convinced from the evidence secured that only about two-fifths or three-fifths of the men who were eating at Government expense were being charged with the meals. We have carefully gone over this evidence and all the other evidence in the case in respect to this matter and are convinced that petitioner has not made out a case entitling it to any allowance upon this item. There were many matters in dispute or in doubt between the petitioner and the Government agents in respect to pay-roll deductions, and many of these were resolved in favor of the petitioner company where it was made to appear that they should be reasonably allowed, and in this case, as in many others affecting this claim, the items here asked for are but a residue of disputed or doubtful items for which the Government auditors could find no justification for passage or allowance.

3. Bicycles, \$41.80. The petitioner bought two bicycles for use at the site of the work and placed them upon a rental of 10 cents per day each as agreed upon with the contracting officer. After rental

had been paid upon these bicycles for about 100 days they were worn out and became useless and the contracting officer declined to pay any further rental for them. The petitioner now comes forward with the claim that the Government should buy them at the price which petitioner paid for them, namely, \$30 apiece, and that the amount of recovery upon this item should be the difference between the rental paid and the purchase price. This can not be done. There was no obligation upon the part of the Government in the contract with petitioner to purchase any rented article of equipment, but the Government had the option to do so. The contract is very plain upon that point. It says:

"At the completion of the work the contracting officer may at his option purchase for the United States any part of such construction plant then owned by the contractor by paying to the contractor the difference between the valuation of such part or parts and the total rentals theretofore paid therefor."

The stipulated rental of 10 cents per day for the bicycles was agreed upon by the petitioner, and the contracting officer was acting within his rights when he declined to purchase the worn-out bicycles for the Government's account.

4. Funeral expenses, \$86. It seems that a colored man by the name of Fred O'Neil, one of petitioner's employees, was sent to the hospital by the petitioner on November 20 and died on November 29. The hospital authorities notified petitioner to remove the body. Petitioner alleges that the matter was taken up with the construction quartermaster and directions given to have the body prepared for burial, and that petitioner sent it to Cook Bros. undertaking establishment at Newport News and a bill for \$43 was rendered. This bill was passed by the auditor upon the job some time in December, 1917, but disallowed upon presentation at Washington upon the ground that it was not a proper charge as a part of the cost of the work.

Lee Thomas, another colored man, one of petitioner's employees, was sent to the hospital in the early spring of 1918 and died on March 15, 1918. Petitioner alleges that this matter was taken up with Capt. Price, a Government officer on the job, who instructed that the man be buried, and the man was buried and a bill therefor paid by petitioner. We can not find that the Government is liable for the burial expenses of either one of these colored men. It is conceivable that, under the terms of the contract for the construction work at Morrison field, the Government might have become liable for hospital expenses involving the treatment of temporary ailments as a method of accommodating workmen at the job, but it can not be perceived how in any circumstances the burial of these colored men who were suffering and who died merely from natural

causes could be chargeable to the Government as part of the cost of the work, no matter what the opinion may have been of any Government agent upon the job. It is strongly probable that the petitioner undertook to bury these colored men knowing full well that it was not liable to bury them, but doing so upon its own risk. Especially is this true with reference to the man Lee Thomas, who was buried at the expense of the petitioner a long time after the petitioner knew from the authorities in Washington that the Government would not pay for the burial of employees.

5. Legal costs, \$101.38. Petitioner employed a man from Canada to come to the site of the work as a material checker upon a four-months' contract of employment. After this man had been on the job for some time, he took one of petitioner's automobiles off on a trip and had an accident and damaged it to some extent. He was thereupon discharged by the petitioner because of this act. He brought suit against the petitioner before the magistrate upon his contract of employment and secured a judgment before the magistrate in the sum of \$123.84, including magistrate's cost; but this amount, upon motion, was later reduced by the magistrate to the sum of \$71.38, and the claim here presented is for the magistrate's judgment and costs and \$25 attorney's fee. This matter was never billed by the auditors on the job, nor has it received consideration of the auditors in Washington. We are of the opinion that, so far as the attorney's fee is concerned, it can not be allowed. Attorney's fees are not specifically allowed in the contract under which this work was being done. The United States district attorney or judge was available at all times for advice to the petitioner in respect to legal matters, and upon this theory Congress has long since provided that no compensation shall be allowed for the employment of counsel in such cases (U. S. R. S., sec. 365). In respect to the judgment of the magistrate's court, we are of opinion that it is a proper item of cost of the work as contemplated by the contract. The evidence shows that while this employee was efficient as a material checker, yet his conduct in connection with the automobile made his further service undesirable and his discharge at the time reasonably justifiable on the part of petitioner. The suit was brought by this employee upon his contract of employment, which was incidental to the character of work that petitioner was carrying on, and the suit appears to have been conducted in a bona fide manner and judgment to have been rendered properly. In these circumstances, we think, it is an item that should be passed and allowed for payment under the terms of the contract.

6. Hospital services, \$123.70. It is the opinion of this Board that the finding of the Air Service Claims Board in respect to this matter is correct, namely, that Mr. MacDonald, on whose behalf petitioner

paid the hospital and medical bills, was a Government employee and liable for his own expenses, and that the petitioner is not entitled to reimbursement for any bills of this nature paid by the petitioner. It was in its nature merely an advancement made by the petitioner to Mr. MacDonald personally. Mr. MacDonald was a Government employee, and petitioner owed him no legal duty in respect to the payment of any bills whatever. This item should be disallowed. The mere fact that some other Government officer on the job told the petitioner to pay these bills would not make the Government liable unless the bill itself were one which could reasonably be construed as a part of the cost of the work, which it could not be in this case.

7. Accident cases, \$127.65. It seems that a man by the name of Henry Turner, a carpenter, employed by the petitioner, was injured on May 4, 1918, by falling from a ladder upon which he was working. He was immediately, at the request of petitioner's superintendent, sent by the Government surgeon to the Elizabeth Buckstrom Hospital at Newport News, where he received medical and hospital attention, for which the item of \$127.65 is submitted for payment. In view of the letter of September 17, 1917, from Capt. H. R. Eyrich, superintendent, Signal Corps, concentration camp, Morrison, Va., to the petitioner directing that cases of serious accident be sent to the Elizabeth Buckstrom Hospital, and in view also of clause (h) of Article II of the contract under which this work was being done, we believe that reimbursement should be made to the petitioner for the amount of expenditures here involved on account of the accident to the said Henry Turner. It is stated by counsel for petitioner in the evidence that petitioner had taken out at Government expense liability insurance, but that under the terms of the policy the insurance company was not liable for the expense here in question. The evidence before this Board was not sufficient to enable this Board to determine whether or not, under the policy of insurance, the insurance company was liable for the expense here involved, and this matter is being resubmitted to the Air Service Claims Board pursuant to the opinion of this Board that if the insurance company is not liable under the policy, then the Government of the United States should make reimbursement to the petitioner for the expense involved.

8. Miscellaneous supplies, \$314.70. We have examined carefully the evidence in respect to the supplies embraced under this item which are alleged to have been paid for by the petitioner and we do not find that proper evidence was submitted to the auditors at the job upon which reimbursement could be made for these supplies, nor has petitioner at the hearing of the case furnished any additional evidence or sufficient evidence to enable this Board to say that these miscellane-

ous supplies were actually received on the job and used for the Government's benefit on the work. There is some evidence that certain of the items here claimed for were received by petitioner's truck driver at the dock or at the depot at Newport News, but this of itself does not furnish sufficient evidence that such material was received at the site of the work and, as frankly admitted by petitioner, may have been diverted to other work or may have been lost in transit from the time it was received by the truck driver to the time it should have been received at Morrison field. What was lacking in these cases was a property-received report which was habitually made up by the petitioner upon the receipt of any supplies at the site of the work and which property-received report was submitted to the Government auditors and checked up by the Government checkers. In respect to these supplies there were no such property-received reports, which of itself is a very strong indication that these supplies were never received at the job. At any rate, there is no evidence furnished this Board upon which it may be said that the Government would be justified in reimbursing petitioner for any items here claimed for. In respect to certain of the items of supplies here claimed for, relief is asked for upon the theory that there were shortages or that they were lost in transit, and that the accomplishment by the Government of the payment of freight precluded petitioner from recovery from the carrier, but this matter will be discussed more at length in case No. 1932 of this petitioner before this Board.

9. Bonds, \$65.75. This item has been withdrawn from consideration in this case.

10. Plant rental, \$325. It appears that petitioner was directed by a Government officer (Capt. Price) to send down to Morrison field from New York another excavator. This excavator was placed on board freight at New York for shipment, but due to congested traffic and facilities at that time there was some delay in its moving out and the construction officer ordered cancellation of the shipment, but before the cancellation order reached New York the excavator had started to move. In these circumstances it was diverted to another point and there used. The claim here is for rental while the excavator was on the cars from the time of loading until it was diverted and for freight charges to the point to which it was diverted less loading charges. It seems that the contract between petitioner and the owner of this excavator contained the following provision:

"The rental price is to be \$20.00 per day commencing ten days after the date of shipment or on arrival of shipment at destination if the same is received in less than ten days."

The order was canceled by the direction of Government officers after the excavator had moved out on board freight, and we think



that, although no rental could have been charged until the receipt of the excavator at Morrison field, yet the fact that the order for the machine was canceled by Government direction before it was received on the field bound the petitioner to pay rental upon the same 10 days after the machine had been shipped, and this Board is of opinion that the Government in this case is liable to make reimbursement to the petitioner to the extent of the inspection charges and such rental as may have accrued between the period beginning 10 days after the shipment was made and the time the owner began to receive rental upon the job to which the excavator was diverted, such amount, however, not to exceed in any event the amount paid out on that account by the petitioner company.

11. Acme Road & Machinery Co., interest charge, \$14.70. In February, 1918, the petitioner, apparently with the approval of the Government officer, ordered from the Acme Road & Machinery Co. a rock bin and screen which was shipped and invoiced at \$1,296. Due to the fact that this rock bin and screen was late in arriving at the site of the work it was not needed when it did arrive, and petitioner and the Government agents were endeavoring to have the seller take it back or to dispose of it in some other manner. These efforts to otherwise dispose of the machine continued for some time after its arrival and the invoice was not paid until some time in June, 1918. Upon the payment of the principal amount the seller of the machine invoiced back to the J. G. White Engineering Co. an interest charge upon the deferred payment of the purchase money, this machine having been sold upon terms of 30 days net. It is this interest charge that forms the basis of this claim. We think it can not be allowed. It was the duty of the petitioner company to pay for the machine promptly notwithstanding any negotiations that may have been going on to dispose of it to other use than that at Morrison field. It was not necessary for the petitioner company to first secure approval of the invoice from the Government before paying the bill, and it does not appear that the damage here claimed for is directly traceable to any act or conduct upon the part of any Government officer.

12. Express charges, \$2.47. This is an item of an express charge paid by the petitioner company upon certain spare parts of the model K excavator ordered from a man by the name of Sherman (this is the same machine mentioned in par. 10 hereof), which spare parts were shipped by express to Morrison field and this express charge paid by the petitioner company. We think it is proper and should be paid upon the presentation of proper evidence, as this machine, together with its spare parts, was properly ordered, and this express



shipment could not have been stopped after the Government had directed petitioner to cancel the order for the excavator.

13. Bestwall Manufacturing Co., \$18.82. There was a shipment from this company to the petitioner company of a carload of plaster board. The material-received report as made up by the petitioner company showed that there were 885 pieces, 21 of which were in bad condition. It is claimed that, notwithstanding this material-received report, the Government officers accomplished the payment of freight without any exception as to the bad condition of the 21 pieces. It is the opinion of this Board under the circumstances of this case that the mere payment of the freight by the Government in the manner adopted in this case did not preclude the petitioner from deducting the value of the 21 damaged pieces from the invoice furnished by the seller if it was shipped in bad condition (or recovering the same if it had been paid) or from recovering from the railroad company if the damage was caused in transit.

14. New York office disbursements, \$27.25. No evidence as to the actual delivery as to the items of stationery, etc., which go to make up this claim seems to have been filed with the Air Service, and none has been submitted to this Board showing that the material was actually received at Morrison field and used for the benefit of the Government, and this item is therefore disallowed.

15. S. C. Watson's time, \$12.10. This item is for three days' time by Mr. S. C. Watson in inspecting the trench excavator mentioned in paragraph 10 hereof, which was ordered by the petitioner company from New York, but the order for which was canceled. It is the opinion of this Board that the Government is liable under the contract for reasonable inspection charges incurred in inspecting this machine before it went on board the freight, and that this item, when supported by proper vouchers, should be paid.

16. Crane & Co., shortages, \$668. This item is made up of a large number of smaller items of shortages in shipments of piping, etc.; \$163.12 of this amount has been paid by the petitioner to Crane & Co., but the rest is still in dispute between petitioner and Crane & Co. The theory upon which petitioner seeks to recover the amount of \$668 from the Government is that, while this claim represents actual shortages in shipments, yet the accomplishment of the payment of the freight by the Government upon bills of lading which stated that the goods were received in apparently good condition precluded petitioner from making claim for these shortages against the shipper. We think, under the circumstances of this case, this theory is thoroughly unsound. The shortages were of small articles for the most part, and the mere payment of the freight or express upon bills of lading which stated that the stuff upon which the freight was paid was in apparent good condition would not preclude the petitioner

from recovery against the shipper for stuff which was never shipped by Crane & Co., or interfere with petitioner in deducting such shortages from invoices paid.

17. Keystone Driller Co., \$14.40. This is a deduction for a shortage on the shipment by express of 12 feet of roller chain. No evidence of the receipt of this roller chain has been submitted, and same must be disallowed.

DISPOSITION.

A copy of this decision will be submitted to the Claims Board, Air Service, for its information and guidance.

Col. Delafield and Maj. Farr concurring.

JUNE 11, 1920.

**Case No. 2568.**

*In re* **CLAIM OF E. I. DUPONT DE NEMOURS CO.**

1. **EXPERIMENTAL EXPENSE.**—Where claimant has a formal contract to perform experiments for the Government in connection with drop bombs, in which a maximum price is fixed, and after the experimental work contemplated in the contract has been fully completed claimant is orally directed by the Government to perform additional experimental work and these oral directions are confirmed by letters from the Engineering Bureau of the Ordnance Department, claimant is entitled to recover for such additional experimental expense as it may have incurred under such directions which were given prior to November 12, 1918, but as to certain expense included in the claim not ordered until after November 12, 1918, the Secretary of War is without jurisdiction to adjust.
2. **CLAIM AND DECISION.**—Claim for \$22,254.12, under the act of March 2, 1919, for experimental expense in connection with drop bombs. Held, claimant entitled to recover only as indicated in the above syllabus.

Lieut. Col. McKeeby writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919, and is a class B claim for \$22,254.12 upon an agreement alleged to have been entered into between the claimant and the United States.
2. In the spring of 1918 the claimant company was requested to undertake certain experimental work for the Ordnance Department, United States Army, in connection with bursting charges, etc., for drop bombs. The amount of such work was not determined, but, on April 10, 1918, a contract, War Ord. P5609-772E, on a cost-plus basis, was entered into between the Government and the claimant company for experimental work not to exceed the value of \$10,000.
3. The amount of work called for in this contract was fully performed, but further experimental work was required and ordered from time to time orally, which oral instructions were confirmed by letters from the War Department Engineering Bureau, Office of the Chief of Ordnance, Washington, and which letters are in the record.
4. In pursuance of the instructions contained in said letters the claimant company continued the experiments desired and furnished material and labor in connection therewith.

5. The claimant has filed a detailed statement of all expenses in connection with the execution of the various instructions received, which statement shows that the sum of \$22,254.12 was expended thereon.

6. The evidence shows that all of these experiments were conducted upon instructions issued and received by the claimant company prior to November 12, 1918, except tests 17, 18, 19, and 20. Instructions for said tests were issued subsequent to November 12, 1918, and therefore can not be considered under the act of March 2, 1919.

#### DECISION.

1. The Board finds upon all the evidence that an agreement within the purview of the act of March 2, 1919, was entered into between the claimant company and the United States whereby the United States is obligated to reimburse claimant for the amount expended upon labor and material in fulfilling said agreement.

2. The Board further finds that tests 17, 18, 19, and 20 were conducted upon orders issued subsequent to November 12, 1918, and therefore do not come within the provisions of any agreement arising by virtue of the act of March 2, 1919.

3. Certificate C will issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Ordnance Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Averill concurring.

JUNE 11, 1920.

**Case No. 2504.**

*In re* **CLAIM OF FELLOWS MEDICAL MANUFACTURING CO.**

1. **EXPERIMENTAL COSTS—BUSINESS RISK.**—Where claimant experiments in the manufacture of chemicals with the anticipation of receiving Government orders for its product the Government is under no obligation to reimburse claimant for its experimental expense in the absence of an agreement express or implied.
2. **MATERIALS—COSTS IN EXCESS OF PURCHASE PRICE.**—A contractor producing chemicals under a cost-plus contract with a maximum price per pound is not entitled to recover a sum in addition to the maximum amount specified as the purchase price in procurement orders simply because the cost of chemicals furnished thereunder has exceeded the maximum price named therein.
3. **RECOMMENDATION OF AN AWARD.**—Where claimant is advised that it has been recommended for an award of a contract and at the same time is cautioned against incurring expense in preparing to perform prior to the receipt of written orders or a contract the Government is under no obligation to reimburse claimant for any expense incurred by it in preparation for the manufacture of chemicals where no purchase order or contract follows the notification of an award.
4. **SUSPENSION OF CONTRACT—ADJUSTMENT.**—Where claimant's formal contract for the manufacture of chemicals has been suspended after partial delivery it is entitled to an adjustment under the supply circulars on account of the suspension of the said contract notwithstanding it has already been paid for the chemicals delivered.
5. **CLAIM AND DECISION.**—Claim for \$9,357.13 under the act of March 2, 1919, and under G. O. 103 for additional compensation and for loss in the manufacture of benzyl acetate and other chemicals. Held, claimant only entitled to adjustment as stated in syllabus 4.

Mr. Howe writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between claimant and an agent of the Secretary of War, and the case comes to this Board on appeal from the Claims Board, Air Service. The claim involves several items, some of which appear to be claimed under the act of March 2, 1919; and others under G. O. 103.

The items of claim may be enumerated as follows:

(a) Expenses incurred on account of preliminary experiments in connection with the manufacture of benzyl acetate, benzyl benzoate,

and ethyl formate alleged to have been incurred upon oral instructions.

(b) Claim for loss due to suspension of formal contract No. 5404, dated November 22, 1918, for 2,000 pounds benzyl acetate.

(c) Expenses and obligations incurred in preparing to perform an alleged oral contract for 5,000 pounds benzyl acetate.

(d) Monetary loss representing the difference between the cost of production per pound of benzyl acetate, namely, \$5.78, manufactured and delivered under three procurement orders aggregating 1,600 pounds, and the procurement order price, namely, \$5 per pound.

A hearing was held in the case on May 28, 1920.

#### STATEMENT OF FACTS.

1. Claimant is a New York corporation doing business in New York City.

2. During the latter part of August, 1917, it became known to claimant through communication with the Bureau of Aircraft Production that the Government was in need of the chemicals benzyl acetate, benzyl benzoate, and ethyl formate, and that the sources of supply were inadequate to meet the Government's need, benzyl acetate apparently being manufactured at that time almost solely in Germany. Claimant fitted up laboratories, employed expert chemists, and experimented with the production of these chemicals, and from time to time in one way or another received encouragement from representatives of the Government. At the request of the Government, in September or October, 1918, samples of the several chemicals were forwarded to the General Laboratory, Bureau of Aircraft Production, at Pittsburgh, Pa., for test, and claimant at that time gave assistance in these tests by furnishing copies of its methods of analysis, its technique, etc.

3. The claimant's activities in connection with the production of these chemicals continued for a period of several months, and a few days prior to October 18, 1918, claimant was told by Lieut. James L. Dohr, of the Materials Department, Purchases, Chemical Section, Bureau of Aircraft Production, that he was recommending that claimant be given an order for 500 pounds of benzyl acetate. Claimant immediately began to equip itself to perform this anticipated order, and on October 18 following it received procurement order No. 710414 for 500 pounds of benzyl acetate. Two other orders (Nos. 710567 and 710625) for the same amount of the same material followed under like circumstances on October 28 and on November 2.

4. Claimant alleges that on or about the 30th of October, 1918, its managing director and secretary and treasurer, Mr. F. A. H. Anger, called upon Lieut. Dohr in his office at Washington, and



that the latter orally authorized claimant to proceed with the manufacture of an additional quantity of 5,000 pounds of benzyl acetate upon the representation that an order for the same would later be given claimant. No confirmation of this alleged order was ever furnished claimant, but on November 22, 1918, claimant was given an order for 2,000 pounds of benzyl acetate (in addition to the 1,500 pounds embraced in the three procurement orders heretofore mentioned). This order was placed by formal contract No. 5405. This contract was signed by claimant, but not until some time in December, because it was not satisfied with the order for 2,000 pounds, having prepared itself to fill an order for 5,000 pounds.

5. The price of the benzyl acetate called for in the three procurement orders for 500 pounds each was fixed at \$4 per pound, unless the cost of manufacture plus 10 per cent should exceed that amount, but in no event was the price to be over \$5 per pound. The price for the 2,000 pounds covered by the formal contract was set at \$4.50 per pound.

6. No order was ever placed with claimant for benzyl benzoate or ethyl formate.

7. Formal contract No. 5404 was suspended on December 10, when 1,870 pounds of benzyl acetate had been manufactured. This amount was delivered to the Government and has been paid for at the contract price.

8. In the form in which the claim is presented, claimant asks recovery for the following items of expense and loss:

(1) Cost of experimentation with the production of benzyl acetate, benzyl benzoate, and ethyl formate incurred prior to the placing of any of the orders hereinbefore mentioned.

(2) Difference between the contract price and the actual cost of the 1,500 pounds of benzyl acetate manufactured and delivered under the three procurement orders.

(3) The cost of special facilities purchased for the performance of the oral contract for 5,000 pounds of benzyl acetate.

(4) Loss due to suspension of the formal contract for 2,000 pounds of benzyl acetate.

The above division of the claim, it appears, has been made at the suggestion of the Air Service Claims Board and officers through whose hands the claim has passed. It is apparent, however, that what claimant really desires is, upon one ground or another, to be paid the amount of its losses sustained in connection with *all* of its activities and undertakings in connection with the experimentation with the three chemicals and the production and delivery of benzyl acetate.

## DECISION.

1. As regards the item for experimentation claimant has failed to show that it was expressly or impliedly authorized to incur this expense by any representative of the Secretary of War or the President. The evidence shows that this experimentation was undertaken by claimant at its own risk and that, although it received encouragement in this from Lieut. Dohr and perhaps other officers, no agreement was ever entered into under which the Government is in any way liable for this cost.

2. As regards the claim for loss in the manufacture and delivery of benzyl acetate under the three procurement orders, claimant has shown no reason why it should not be bound by the prices mentioned in the procurement orders. Claimant has not attempted to prove any agreement changing the terms of these orders, but has merely shown that the manufacture of benzyl acetate thereunder cost more than the price agreed to. Since the Government has paid claimant the contract price it has fulfilled its obligations to claimant, and relief in connection with this item must be denied.

3. The testimony of Lieut. Dohr is very clear to the effect that he did not orally place an order for 5,000 pounds of benzyl acetate with Mr. Anger, representing claimant, on or about October 30, 1918, as alleged. It shows, rather, that Lieut. Dohr told claimant that he *would recommend* the placing of an order for 5,000 pounds and that, as was his practice theretofore, he cautioned Mr. Anger against considering this promise as an order or contract, or as sufficient authority upon which to incur expenses and obligations. The correspondence that passed between Lieut. Dohr and claimant along about this time is corroborative of Lieut. Dohr's testimony. The fact that in the past statements of this kind from Lieut. Dohr had invariably been followed by written orders or contracts is not sufficient to convert such representations into an agreement binding upon the Government. It is to be noted that this item of claim is made up almost entirely of expenses incurred prior to October 30, the date of the conversation between Mr. Anger and Lieut. Dohr. This fact goes to show not only that no particular preparation was made upon the strength of what Lieut. Dohr is alleged to have said, but also that it was claimant's practice to prepare itself to manufacture benzyl acetate before it even approached Government officials for a definite and certain order for the same. Looked at from any angle, we are unable to find any agreement, express or implied, under which the Government has agreed to reimburse claimant for the expenses composing this item.

It is urged by claimant that the subsequent placing with it of the formal contract of 2,000 pounds of benzyl acetate is evidence

of the existence of the oral contract for 5,000 pounds, because this formal contract was given as a part fulfillment of the 5,000-pound agreement. The evidence shows, however, that this contract for 2,000 pounds was recommended by Lieut. Dohr, not upon the understanding that he had an agreement with claimant for 5,000 pounds, but simply because the department could make use of 2,000 pounds, and because he desired to see claimant relieved in so far as possible of loss, in view of the cooperation and assistance that his department had received from claimant, which he had understood from claimant an order for 2,000 pounds would be sufficient to do. The claim as respects this item is therefore denied.

4. Claimant is entitled to an adjustment of its suspended formal contract, No. 5404, for 2,000 pounds of benzyl acetate. Claimant has shown that it was equipped and prepared in every respect to perform this contract according to its terms when it was suspended on December 10, 1918.

#### DISPOSITION.

1. This claim will be returned to the Claims Board, Air Service for adjustment of Contract No. 5404.

2. In all other respects the claim is denied.

Col. Delafield and Mr. Hope concurring.

JUNE 12, 1920.

**Case No. 1991.**

*In re* **CLAIM OF COLT'S PATENT FIREARMS MANUFACTURING CO.**

1. **INCREASED WAGES.**—Where contracts provide in substance that in the event of labor disputes likely to delay the performance of the contract that the Secretary of War may settle such disputes and that if the contractor is required to pay higher labor costs thereby that the Secretary of War shall make an addition to the contract price, and a dispute arises, which is adjusted by a representative of the Secretary of War, who raised the cost to be paid for labor and granted the contractor additional compensation, the contractor is entitled to be paid such increased compensation.
2. **ITEM—AGREEMENT BY LETTERS.**—Where the claimant was also producing under several contracts, which did not contain the provision mentioned in clause one, but it was agreed by letter that all labor disputes under all contracts should be adjusted by the Secretary of War, with a corresponding adjustment of the price, an agreement arose under the act of March 2, 1919, to reimburse claimant for increased cost of labor on such contracts.
3. **CLAIM AND DECISION.**—Claims under G. O. 103 and act of March 2, 1919, for \$136,428.99 increased labor costs. Held, claimant entitled to recover.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises in part under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In part the claim is presented in accordance with General Order No. 103, War Department, 1918, under circumstances which hereinafter appear.

3. The claimant is a manufacturer of munitions. In November, 1917, it was engaged in the performance of certain contracts entered into with the Government. It was expected that further contracts would be given to the claimant.

4. Under date of November 27, 1917, the claimant wrote the following letter to the Secretary of War:

“We recognize the problem which confronts you in securing continuous and accelerated production of munitions of war, and we desire to share every responsibility that may be yours in connection therewith.

\* \* \* \* \*

"However, we recognize in the present crisis the necessity of continuous production under all conditions, and should difficulties arise which threaten to delay or diminish the production of our factories and a prompt settlement of such difficulties becomes necessary in the interest of the Government, we shall be glad to have, and hereby agree to have, the Secretary of War settle such difficulties in such a manner as he deems proper.

"Since the contracts made with the Government are based upon existing wage conditions, it is understood that compensatory adjustment shall be made in the price of articles called for in the contracts in case of any change in wages.

"Our contracts for munitions of war are made upon the above understanding."

5. In response the claimant received the following letter, dated December 1, 1917:

"I have received your letter of November 27 with regard to the responsibility which rests upon the Secretary of War in the matter of securing continuous and accelerated production of munitions of war. The helpful attitude taken by your company is keenly appreciated."

6. Under date of December 10, 1917, the claimant received the following letter:

"I am instructed by the Chief of Ordnance to acknowledge receipt of your letter of November 27, 1917 (C. M. G. 230.44/21), addressed to the Secretary of War, on the subject of the settlement of labor disputes arising during the performance of Government contracts. This letter has been referred to this office for use in connection with the preparation of future contracts.

"It is noted you state in your letter that 'it is understood that compensatory adjustment shall be made in the price of articles called for in contracts in case of any change in wages.' It should be clearly understood in this connection that compensatory adjustment will be made only in the case of an increase in wages resulting from the settlement of a labor dispute by the Secretary of War during the performance of this contract, and that this letter should not be construed as an authority for price adjustment based upon a voluntary increase in the rate of pay of the employees of your company.

"It should be further understood that if the settlement of a labor dispute by the Secretary of War results in a reduction in the labor costs, a fair deduction shall be made from the purchase price, all as may be determined by the contracting officer. It should be further understood that no claim for addition or deduction on account of increased costs due to such settlements shall be allowed unless the same has been ordered in writing and actually put into effect.

"All formal contracts covering material being procured from your company will be made up along the lines stipulated herein.

"Respectfully,

"EARL MCFARLAND,  
"Major Ord. Dept."

7. In the early part of October, 1918, serious trouble arose between the claimant and its employees relative to wages.

8. Claimant on October 12, 1918, addressed the following telegram to Maj. B. H. Gitchell, of the Industries Service Section of the Ordnance Department:

"At ten o'clock this morning about eight hundred employees, in accord with action decided at meeting held at union headquarters last evening walked out. Approximately seventy-five per cent were men of ages twenty to thirty. Full and precise information is being compiled and will be forwarded at earliest possible moment. Proportion leaving varies in different departments but walkout not complete in any department."

9. On October 9, 1918, the claimant addressed a letter to Maj. B. H. Gitchell, which was in part as follows:

"Subsequent to the interview with you by Mr. Stone and Mr. Wells they were advised by Representatives of the National War Labor Board that the National War Labor Board were ready to drop the Colt's Patent Fire Arms Mfg. Co.'s case from their docket.

\* \* \* \* \*

"We believe that the dismissal of the matter by the National War Labor Board without request from the War Department furnishes a very happy solution of the problem.

\* \* \* \* \*

"We do not anticipate that any labor disturbances will result. If, however, contrary to our hopes and expectations, labor disputes should arise as a result of the action of the National War Labor Board which threatens to delay or diminish the production of our factory and the prompt settlement of such difficulties by governmental action becomes necessary in the national interest, we believe that more satisfactory results will be obtained if the settlement be made by yourself, or some other officer delegated by the War Department for that purpose, than if the matter is referred to the National War Labor Board."

10. Under date of October 14, 1918, the claimant addressed the following letter to the Chief of Ordnance, United States Army, at Washington, D. C.:

"The opinion of the Colt's Patent Fire Arms Mfg. Co. that the Secretary of War rather than the National War Labor Board should have jurisdiction in the adjustment of labor difficulties arising at this plant is based upon the facts contained in the attached exhibits.

"A walkout having occurred Saturday, October 12, 1918, at ten a. m., occasioned the recommendation for action by Major Woodbury, a representative of the Ordnance Department at this plant.

(a) Letter of Nov. 27, 1917, from Colt's Company to the Secretary of War.

(b) Letter of Dec. 1, 1917, from the Secretary of War to Colt's Company.

(c) Letter of Dec. 10, 1917, from Major Earl McFarland, Ord. Dept., to Colt's Company.



(d) Letter of Oct. 9, 1918, from Colt's Company to Major D. H. Gitchell, of the Industrial Service Section.

(e) Telegram of Oct. 12, 1918, from the Colt's Co. to Major Gitchell.

(f) Copy of clause appearing in several contracts made with Colt's Co. by the Ordnance Department, Procurement Division.

"The walkout referred to above and reported under Exhibit E interfered with production of automatic pistols, cal. .45, Vickers machine guns, Browning heavy machine guns, and miscellaneous material covered by several contracts and procurement orders included in the following list:

Date.	Number.	
7/16/17	CMG 3.....	10,000 Browning heavy guns, model of 1918.
9/18/17	14670.....	500,000 auto. pistols, cal. .45.
9/18/17	14671.....	1,000,000 pistol magazines.
5/24/18	P8594-1707Sa.....	Conversion of Russian Vickers guns.
6/7/18	P5662-1412Sa.....	9,531,244 pistol magazines.
6/11/18	Supplement to P4813-1368Sa.	206,000 revolvers.
8/6/18	P13095-2177Sa.....	Spare parts for revolvers.
8/9/18	P13264-2196Sa.....	Spare parts for pistols.
8/15/18	P13565-2252Sa.....	Repairing revolvers.
8/20/18	P13835-2311Sa.....	Repairing pistols.
9/5/18	P14632-2456Sa.....	1,000 reinforcers and buffer springs.
9/18/18	P15128-2571Sa.....	4,300 speeding-up devices.
6/13/18	PJ886-1851Sa.....	6,000 Vickers aircraft guns. <sup>1</sup>
10/2/18	P <sup>472. 91</sup> 718.....	7,500 Vickers aircraft guns. <sup>1</sup>

<sup>1</sup> Letters to Vickers, Limited.

11. Under date of October 17, 1918, the claimant addressed the following letter to Maj. B. H. Gitchell:

"Confirming our conversation of this afternoon, the Colt's Patent Fire Arms Mfg. Company agrees that if you shall find that labor disputes now exist in its plant, causing or likely to cause delay in making deliveries, and if by reason thereof you, as representative of the Secretary of War, undertake to settle such disputes, the company hereby agrees to accede to and comply with all the terms of your decision, it being distinctly understood that such settlement is made under the provisions of the correspondence and contracts referred to in our letter of October 14, 1918, to the Chief of Ordnance, and that any increase in labor cost resulting from your decision shall entitle this company to a fair and just addition to the contract prices therefor."

12. On October 21, 1918, Maj. B. H. Gitchell was appointed by order of the Secretary of War sole arbitrator to settle the labor disputes at the claimant's plant. The said order read as follows:

"I hereby appoint Maj. B. H. Gitchell, U. S. A., as sole arbitrator to settle the labor disputes which now exist at plant of the Colt's Patent Fire Arms Manufacturing Company, Hartford, Conn., and any other companies located in Hartford and vicinity which have been or may be referred to this office for adjustment."

13. Thereupon Maj. Gitchell, after investigation of conditions at the claimant's plant, issued an award under date of October 23, 1918. This award included increases in the wage scale in force at the claimant's plant.

14. Clause 7 of the award read as follows:

"7. *Compensation.*—Pursuant to the provisions in the contract with the War Department, it is hereby directed, as part of this award, that reimbursement be made to the Colt's Patent Firearms Mfg. Company for all increases in labor costs due to the adoption of the forty-eight hour week and to the increase in the hourly rates for day workers. In computing such increased labor costs proper allowance should be made for the saving due to elimination of the bonus."

15. On October 31, 1918, the claimant was authorized to put the award into effect by letter, as follows:

"You are hereby authorized to put into effect in your plant at Meriden, Connecticut, the award of the undersigned, sole arbitrator appointed by the Secretary of War under date of October 29 to settle the labor dispute existing in the plant of your company at Hartford, Connecticut."

16. The claimant thereupon put into effect the provisions of said award, and the present claim is brought to cover the additional expense to which the claimant was put by reason of the payment of increased wages under the said award.

17. The contracts which were in course of performance at the time when the award took effect were as follows: CMG 3; CMG 174; P4813-1368Sa and 2 supplements; P13095-2177Sa; CMG 6; P2936-1218Sa; P10740-1932Sa; P14321-2405Sa; P14094-2364Sa; CMG 181 14670; P18497-2992Sa; P13264-2196Sa; 14671; P5662-1412Sa; P14839-R143; P15128-2571Sa; P16271-2692Sa; P16416-2711Sa; P8594-1707; letter 10/19/18—.45 c. Colt automatic pistols.

18. It appears that the Government entered into two contracts with a corporation known as Vickers Limited, organized under the laws of Great Britain, as follows: June 13, 1918, P9886-1851; October 2, 1918, letter P472.91/718.

19. Under an agreement between the claimant and the said Vickers Limited the above two orders had been assigned to the claimant and were being fulfilled by it with the knowledge of the officials of the Ordnance Department. An official of the claimant also held a power of attorney to act for the Vickers Limited in connection with the two orders. The orders were in course of performance in October, 1918, and the compensation claimed in this case includes the additional expense occasioned in connection with these two orders by reason of Maj. Gitchell's award. Neither of the two contracts with Vickers Limited contained labor-dispute clauses.

20. Certain of the claimant's contracts in connection with which the present claim is made contained so-called labor-dispute clauses in one of the following forms, which, for the sake of convenience, we have numbered Forms I to V:

FORM I CONTAINED IN CMG 3.

"ARTICLE III—SECTION 3. If, as a result of the settlement of labor disputes by the Secretary of War, or as a result of any present or future Executive order of the President of the United States, the contractor is required to pay labor costs higher than those theretofore prevailing in the performance of this contract, a fair addition to the purchase price of the articles shall be made therefor; but if such settlement or such Executive order reduces the labor costs of the contractor, a fair deduction shall be made from the purchase price, all as may be determined by the contracting officer. No claim for addition or deduction on account of increased costs due to such settlement or such Executive order shall be allowed unless the same has been ordered in writing and actually put into effect."

"ARTICLE XIII. In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause delay in making the deliveries upon the date or dates specified, the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War with the request that such dispute be settled, and the contractor shall furnish such information and access to information within his control as the Secretary of War shall require; and it is stipulated and agreed that the Secretary of War may thereupon settle or cause to be settled such dispute, and that the contractor shall accept and comply with all the terms of such settlement."

FORM II CONTAINED IN CMG 6.

"ARTICLE III—SECTION 3. If, as a result of the settlement of labor disputes by the Secretary of War, or as a result of any present or future Executive order of the President of the United States, the contractor is required to pay labor costs higher than those theretofore prevailing in the performance of this contract, a fair addition to the purchase price of the articles shall be made therefor; but if such settlement or such Executive order reduces the labor costs of the contractor, a fair deduction shall be made from the purchase price, all as may be determined by the contracting officer. No claim for addition or deduction on account of increased costs due to such settlement or such Executive order shall be allowed unless the same has been ordered in writing and actually put into effect."

FORM III CONTAINED IN P13095-21778a, P13264-21968a, P14094-23648a.

"ARTICLE XXV. *Labor disputes*.—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, the Secretary of War may settle or cause to be settled such disputes, and the parties hereto agree to accede to and comply with all the terms

of such settlement. If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or his representative in making such settlement, and as a part thereof, may direct that a fair and just addition to the contract price shall be made therefor, but if such settlement reduces such labor costs to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price. No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative, and such addition to the contract price was directed as part of the settlement. Every decision or determination made under this article by Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto. Compliance with the provisions of this article shall be of the essence of this contract."

FORM IV CONTAINED IN P18497-2992Sa, P14321-24058a, P10740-1933Sa, P2936-1218-Sa, CMG 181.

"ARTICLE XXII. *Adjustment of labor disputes.*—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties thereto agree to accede to and to comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement, and as a part thereof, may direct that a fair and just addition to the contract price shall be made therefor: *Provided, however,* That the Secretary of War or his representative shall certify that the contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred.

"If such settlement reduces such labor cost to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

"No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement.

"Every decision or determination made under this article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto."

FORM V CONTAINED IN CMG 174.

"9. It is further stipulated and agreed that the formal contract to be entered into covering the material ordered herein shall contain

the following clause, 'If, as a result of the settlement of labor disputes by the Secretary of War or as a result of any present or future Executive order of the President of the United States, the contractor is required to pay labor costs higher than those theretofore prevailing in the performance of this contract, a fair addition to the purchase price of the articles shall be made therefor; but if such settlement or such Executive order reduces the labor costs of the contractor, a fair deduction shall be made from the purchase price, all as may be determined by the contracting officer. No claim for addition or deduction on account of increased costs due to such settlement or such Executive order shall be allowed unless the same has been ordered in writing and actually put into effect.'"

21. Other contracts of the claimant contained no references to labor disputes.

#### DECISION.

1. The rights of the claimant in respect to such of its contracts as contained labor-dispute clauses should be governed by the language of those clauses.

2. The general purpose of the clauses is the same, although the language differs and there are certain conditions in some clauses which are absent from others.

3. The provision, however, that in the event of the happening of the contingencies outlined in the various labor-dispute clauses the claimant shall receive a fair addition to the purchase (or contract) price, is common to all of the clauses. In other words, the relief to which the claimant is entitled, if at all, is the same under each clause.

4. Without attempting to make a detailed finding of fact, we think it is sufficient to state that we find that all the contingencies have happened and the provisions have been complied with so as to entitle the claimant to a fair and just addition to the prices set in such of its contracts as contained any one of the foregoing labor dispute clauses, with the exception, however, that in connection with the contracts containing the clause which we have designated "Form IV" the claimant should be required to obtain from the Secretary of War or his representative a certificate that it has in all respects lived up to the terms and conditions of its contracts, or a waiver in writing, for the purpose of this relief only, of any breach that may have occurred.

5. In respect to contracts which contained no labor dispute clause, we find that the claimant likewise is entitled to relief in accordance with the provisions contained in the letter from the Chief of Ordnance, dated December 10, 1917, and claimant's letter of October 17, 1918. In pursuance of the terms of these letters the claimant is entitled to compensatory adjustment so far as expense has been caused to the claimant in connection with its said contracts by reason of



increases in wages resulting from the settlement of labor disputes by Maj. Gitchell hereinbefore described.

6. In respect to the contract and informal order entered into between the Government and Vickers (Ltd.), the claimant is likewise entitled to compensation in accordance with the letter of the Chief of Ordnance, dated December 10, 1917, and claimant's letter of October 17, 1918, just referred to. It is true that the contracts in question were executed by the Government with Vickers and not with the claimant. The claimant, however, in its letter of October 14, 1918, in which it gives notice of a strike in its plant and asks adjustment by the Secretary of War, refers specifically to the two contracts in question. On October 17, 1918, the claimant wrote to Maj. Gitchell referring to its letter of October 14, 1918, agreeing to accede to any settlement which Maj. Gitchell might make as the representative of the Secretary of War and stating its understanding that such settlement would be made in accordance with the provisions of its letter of October 14, 1918.

7. We find from the foregoing and other evidence in the case that an implied agreement between the Government and the claimant arose to make compensatory adjustment in connection with the two contracts then in course of fulfillment for Vickers (Ltd.), as well as in connection with the contracts made directly between the Government and the claimant.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action in connection with such of the claimant's contracts as contained the labor dispute clauses above described.

2. The Board will make and transmit a statement of the nature, terms, and conditions of the informal agreement herein found, relating to such of the contracts of the claimant as contained no labor dispute clauses and relating to contracts between the Government and Vickers (Ltd.), and certificate C, to the Ordnance Claims Board for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.



JUNE 12, 1920.

**Case No. 2456.**

*In re* **CLAIM OF BREESE AIRCRAFT CO. (INC.).**

- 1. JURISDICTION—FORMAL CONTRACT.**—Where a formal contract has been fully performed the only function of this Board is to determine doubts and disputes in reference to performance in order that such determination may be certified to the Department of the Treasury for the information of the Comptroller, the Secretary of War having no authority to make settlement.
- 2. CONSOLIDATION OF CONTRACTS.**—Where upon a sufficient consideration and for mutual convenience of the parties a contract for the manufacture of airplanes and a contract and its supplement for the manufacture of spare parts for such planes are consolidated such contracts will be treated as one.
- 3. CONTRACT, CONSTRUCTION OF—TIME OF DELIVERY.**—Where a contract for airplanes providing that the Government will furnish the motors therefor to be installed by claimant provides a schedule of deliveries for the completed planes there is an implied obligation on the part of the Government to deliver the motors to the contractor within such time as will reasonably enable the contractor to install the motors so as to meet the schedule of deliveries.
- 4. BONUS.**—Where the contract referred to in the above syllabi provides that if the Government shall not furnish the motors within three months that the contractor shall be entitled to receive the full fixed profit, such amount is the limit of the Government's liability for profit and claimant is not entitled to recover item 2 of its claim for additional bonus.
- 5. EXECUTIVE SALARIES.**—Where a corporation is organized solely for the purpose of carrying out a manufacturing contract with the Government there is an obligation on the part of the Government, upon suspension of the contract, to reimburse claimant for such part of the salaries of its executive officers for such time and in such amount as may be reasonably necessary to wind up its business.
- 6. CLAIM AND DECISION.**—Claim for \$50,462.86 under G. O. 103, appeal from Claims Board, Air Service, on disallowance by it of certain items of the claim. Held, claimant entitled to an adjustment as stated in the opinion.

Mr. Montgomery writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case comes on appeal from the Claims Board, Air Service. It arises by reason of the suspension of three formal contracts—No. 2365, between the claimant and Maj. A. C. Downey, Signal Corps,

United States Army, dated December 6, 1917, for the manufacture of 300 Breeze Penguins complete, "excepting motors, which shall be furnished by the Government"; No. 2538, between the same parties, dated January 23, 1918, for three sets of spare parts for Penguin airplanes, each set to consist of spares for 100 of such planes; and a supplement, No. 2538-1, between the claimant and Lieut. F. D. Schnacke (A. S., Sig. R. C.), dated March 12, 1918, reducing the number of spare parts to one-half the amount specified in contract No. 2538.

2. The claim as originally presented is for \$50,462.86. Its allowance for \$31,863.58 was subsequently recommended by the New York district board of claims. On the basis indicated by that board it was subsequently figured at \$32,653.23, and the contractor agreed to accept that amount on condition that it should be approved; but the amount having been cut down by the Claims Board, Air Service, claimant now insists upon the full amount.

3. Prior to the making of these contracts promoters of the claimant corporation had a Penguin airplane which had been designed and manufactured and was intended for use in training men for the handling of airplanes. It was understood by both parties to the contracts that the claimant had no factory or capital, only an option on a lease of a factory. Under the three contracts above mentioned claimant established its factory, manufactured in accordance with the provisions of the contracts until notified to suspend manufacture, and then proceeded to settle its accounts with the Government and close up its business. During all its operations it was engaged exclusively in Government work, and had only the three contracts here in question.

4. Contract No. 2365 for the 300 Penguins provides that the price to be paid the contractor shall be the sum of the following items:

"(1) The actual cost of production as in Article V hereof defined and in Article VII hereof determined.

"(2) The sum of two hundred and forty dollars (\$240.00) as fixed profit on each article delivered and accepted.

"(3) An amount for saving effected determined according to the provisions of section (7) of Article VI hereof, provided that in case of the termination of this contract under the provisions of Article XI, this item shall be the amount therein provided on all articles to which it shall apply."

5. Section 7 of Article VI provides that, as an inducement to economy in production and in consideration of any saving to the Government which the contractor may effect below the estimated cost of the articles to be manufactured, there shall be paid the contractor a sum for saving effected by it determined as therein set forth. The estimated cost of each article is agreed to be \$1,600. The agreement fixes

a method of determining the actual cost and provides that if the actual cost so arrived at is less than the total estimated cost, the Government shall pay the contractor on account of such saving 25 per cent of such difference; but if the amount of the average actual cost so arrived at of all the articles delivered and accepted shall exceed by 50 per cent the estimated cost of each article, then the contractor shall pay to the Government a like percentage.

6. Contract No. 2538 for spares, as modified by supplemental contract No. 2538-1, provides that the price to be paid the contractor shall be the sum of the following items:

“(1) The actual cost of production as is defined in Article V and as is determined in Article VII of this contract.

“(2) A fixed profit of 15 per cent of the estimated cost set forth in the schedule hereto attached, marked “Schedule B” of each spare part delivered and accepted hereunder.

“(3) An amount for savings effected to be determined according to the provisions \* \* \* hereof.”

7. The estimated cost of spares under the supplemental contract is \$226,050, but apparently by subsequent reduction or by consent it was thereafter fixed at \$219,300.

8. The contract for spares contains a provision with reference to saving, which is in part as follows:

“At the completion, or termination for reasons other than the default of the contractor, of the contract, the total actual cost of all articles completed and accepted, excluding, however, royalties paid by the contractor, depreciation and the cost of special tools provided for the purpose of this contract exclusively, shall be determined;

\* \* \* \* \*

“If the amount so arrived at in accordance with the foregoing provisions shall be less than the total estimated cost of all the sets of spare parts, completed and accepted, the Government shall pay the contractor, on account of such saving, twenty-five per cent of such difference.

“If, on the other hand, the amount of actual cost so arrived at of spare parts delivered and accepted, shall, except on account of causes beyond the contractor's control, exceed by fifty per cent (50 per cent) the estimated cost thereof as above modified, then twenty-five per cent (25 per cent) of any amount by which such actual cost shall exceed 150 per cent of said estimated cost shall be paid by the contractor to the Government.”

9. Article XI of the spares contract provides that in the public interest—

“this contract may be terminated by notice in writing to the contractor without prejudice to any claim the Government may have against the contractor, provided that in case of determination for any cause other than the contractor's default, thirty days' notice, in writing, shall be given, and that after receipt of said notice the contractor shall not order any additional material except by permission

previously obtained from the approval officer, but inspection and acceptance by the Government of spare parts completed by the contractor during the said period shall continue as though such notice had not been given. The termination shall be deemed to be effective at the expiration of said thirty days' notice."

It further provides that upon the termination for any reason other than the contractor's default, the Government shall pay the expenditures in connection with the production, and, in addition, (1) on the spare parts, properly packed and accepted, the fixed profit; and (2) on all material and all spare parts not accepted, both finished and unfinished, 10 per cent of their cost in lieu of the fixed profit and bonus.

10. Contract No. 2538, as drawn, does not state on its face that it is a supplemental contract, although it refers to contract No. 2365, and can not be understood without reference to the latter. The parts for the Penguins and the spare parts were manufactured together, and when it became apparent that it was unnecessary and undesirable to treat No. 2365 as one contract and No. 2538 and its supplement, No. 2538-1, as a separate one, Capt. Schnacke, the contracting officer, wrote the claimant, under date of June 7, 1918, as follows:

"2. This will be your authority for considering contracts 2538 and 2538-1 as supplementals to contract 2365 covering order 20315. In this way it will not be necessary for you to keep separate costs for the planes and for the spares as such a procedure would be found to be impracticable."

To this arrangement the claimant assented, and the accounting was had on that basis.

11. Claimant performed its part of the contracts with such promptness and efficiency as to entitle it both to the stipulated profit and to the bonus for saving expense. It contends that, but for the delays on the part of the Government in the delivery of motors, it would have been entitled under contract No. 2365 to \$13,451.06 more than was allowed it. Under this contract full settlement has been made except as to this item which has been disallowed.

12. This contract provides that the contractor shall make for the Government "300 Breese Penguin complete, excepting motors, which shall be furnished by the Government and delivered to the plant of the contractor, where they shall be installed by the contractor." It contains the further stipulation:

"Time being of the essence of this contract, the contractor agrees to provide with the utmost dispatch," etc.

It contains this further provision:

"If, however, solely by reason of the failure of the Government to furnish motors in accordance with article 1 hereof, the acceptance and delivery of any unit should be delayed beyond ten days, the contractor shall be paid, upon final inspection and acceptance of such

without motor, the sum of two hundred and twenty-eight dollars (\$228.00) and the balance of the fixed profit provided in this section upon the installation by him of the motor, as provided in article 1 hereof, provided if the motor is not furnished by the Government within ninety days from acceptance and delivery of the unit the balance of the fixed profit shall be paid."

13. The suspension occurred on September 10, 1918. A letter of that date, referring to the contract for spare parts, stated that "inasmuch as the Government is not now using the Penguin plane, you are hereby instructed to cancel all the material under this order that has not been delivered up to this date." The letter further requested a list showing the amount of the different items of spare parts that had been shipped, "in order that the order may be amended accordingly." Mr. Turner, the Government accounting officer, told the claimant's officers that there was no need of going further with the manufacture; that it would be just a waste of money; and that therefore the claimant should stop.

14. By the 15th of October all of the 300 Penguins covered by contract No. 2365 had been accepted and delivered and have been paid for. The claimant, having no other business than that required of it under the terms of the contracts for Penguins and spare parts, could not at once cut off its overhead. It maintained its office at Farmingdale, Long Island, N. Y., until about January 1, 1919, and thereafter moved it to New York City, and makes claim for its expenses, the chief items of which are the salaries of its executive officers.

15. The claim as presented and as allowed by the District Board of Claims is summarized in a letter from Col. Rose, chairman of that Board, as follows:

Item No.	Name.	Amount claimed.	Amount recommended.
1	Profit and bonus on spares.....	\$14,165.08	\$11,332.06
2	Additional bonus.....	13,451.06	.....
3	Charges back.....	7,834.20	7,834.20
4	Executive salaries.....	13,483.30	11,764.55
5	Plant protection.....	635.27	635.27
6	Traveling expenses.....	596.45	.....
7	Garage bill.....	78.00	78.00
8	Freight on dope.....	73.00	73.00
9	Rental of typewriters and adding machines.....	146.50	146.50
		50,462.86	31,863.58

To item No. 1, an addition of \$789.65 was subsequently made, bringing it up to \$12,121.71 and the total to \$32,653.23.

16. The Claims Board, Air Service, allowed items 3, 5, 8, and 9, refigured item 1, and disallowed the remaining items. It undertook to allow claimant its profit and bonus on the spares completed at the

time of suspension of the contract, and 10 per cent of the cost value of the remaining items, as the contract provides shall be done. It figured the actual cost of two-thirds of the spares contract by adding to the amount already expended thereon the estimated amount necessary to complete the contract, and taking, as the actual cost of the completed spares, two-thirds of the amount so ascertained.

17. Some evidence was submitted to the standing committee of the War Department Claims Board and its opinion was asked concerning the method of determining the compensation to which claimant was entitled for the spares on hand September 10, 1918, when the Government requested suspension of the contract. The chairman of the committee, in a letter to a member of the Claims Board, expressed the conclusion of the committee as follows:

“Under the termination clause of the contract for spares the contractor had the right to continue the work for thirty days. There is evidence that the Government accepted the unassembled spares as completed articles under the contract. It is therefore the opinion of the standing committee that the contractor be allowed his 15 per cent profit, together with the 25 per cent bonus upon the cost of bringing the spares to that stage of completion which existed at the time the unassembled spares were accepted as completed by the Government.”

18. It does not appear what evidence was presented to the standing committee of the War Department Claims Board, but the evidence before this Board proves that the contract for spares was not completed. The evidence shows that not more than two-thirds of the spares had been fully completed; that the remainder were between 80 and 90 per cent completed, and that had the claimant been given the 30 days specified in the contract, it could have completed them all.

19. The figures of the Claims Board, Air Service, as to the spares contract are as follows:

Estimated cost of completed part being two-thirds of total bogey of \$219,300 .....	\$146, 200. 00
Actual cost of spares contract to date as total actual cost as claimed.....	\$125, 184. 53
Plus additional allowed as cost.....	854. 77
	<hr/>
	126, 039. 30
Two-thirds of \$126,039.30.....	84, 026. 20
Difference .....	62, 173. 80
One-third 80 per cent complete would be 80 per cent of \$42,013.10..	33, 610. 48
Profits under contract:	
15 per cent of total bogey of two-thirds, or \$146,200.....	21, 930. 00
	<hr/>
25 per cent difference, \$62,173.80.....	15, 543. 45
10 per cent uncompleted one-third cost \$33,610.48 in lieu of profits on completed.....	3, 361. 05
	<hr/>
Total earned .....	40, 834. 50
Total paid as shown.....	42, 258. 79
	<hr/>
Overpaid on spares contract.....	1. 424. 29



That Board accordingly made the following award:

Reimbursement on items charged back-----	\$7, 834. 27
Additional cost:	
Plant protection -----	635. 27
Freight on dope-----	73. 00
Rental on typewriters-----	146. 50
	<hr/>
	8, 689. 04
Less overpaid profits-----	1, 424. 29
	<hr/>
Net to be awarded-----	7. 264. 75

#### DECISION.

1. The first question is one of jurisdiction. If the claimant's contracts have been fully performed, the only function of this Board is to determine the doubts or disputes with reference to the performance, in order that such determination may be certified to the Department of the Treasury for the information of the comptroller. The Secretary of War would have, in that event, no authority to make settlement.

2. If, on the other hand, the claimant's contracts have not been performed and are still pending, it is the duty of this Board to determine any doubts or disputes with reference to a settlement contract in accordance with the established practice of the War Department.

3. In determining the question of jurisdiction, it must first be ascertained whether the three written contracts between the Government and the claimant constitute one or two agreements. When the contract for spares (No. 2538) was entered into, it was in form and substance a separate and independent agreement. The supplemental contract, No. 2538-1, was and is merely a modification of the contract for spares. Thus, there were, at the outset, two separate agreements, the agreement for Penguins evidenced by No. 2365 and the agreement for spares evidenced by Nos. 2538 and 2538-1. These two agreements must be treated as distinct and separate, unless, by subsequent agreement, upon a valuable consideration to the Government, they have become so merged as to constitute one contract.

4. It appears that in the interest of both parties it became desirable, during the performance of the agreements, to treat them as one, regarding the agreement for spares as supplemental to the contract for Penguins. This was suggested in connection with the accounting, and the vouchers were made thereafter under both agreements, referring to all three contracts by their numbers. This, however, is not, of itself, sufficient to indicate that the contracts became, in legal effect, one agreement. The mere making of payments on two contracts by one voucher would not constitute them one contract.

5. Whether the contracts were or were not merged depends upon whether the substantial rights of the parties were changed by the

agreement that the contracts should be treated as one. A saving was effected in this manner by eliminating the necessity for the allocation of material, part to one contract and part to the other; and in the manufacture no account was kept as between the two. It became impossible to show in an accounting under either one of the contracts what material had been used in connection therewith. In this respect and in others either the Government or the claimant might have obtained a material advantage in having the two contracts treated as one rather than as two. This fact constituted a sufficient consideration for the agreement that the two contracts should be treated as one, and thereafter had there been a rescission from default under either contract, both would have been thereby rescinded. So where one was suspended the suspension applied to both. The two had become merged by express agreement and are now one contract.

6. The direction "to cancel all the material," together with the Government accounting officer's direction to stop manufacture, was manifestly not given under the termination clause in the contract. Had the Government availed itself of the termination clause in the contract, the contractor would have been entitled to continue manufacture for 30 days. The evidence shows it would have fully completed its contract within that time.

7. Instead of so doing, the Government requested that a saving be made by a stoppage of production, and to this the claimant assented. It disposed of the finished planes and of the spare parts, finished and unfinished, as the Government directed from time to time, thus keeping its contract suspended and subject to adjustment.

8. The question remaining to be determined is, What settlement should be made under the practice of the War Department? The claimant asserts that the spares were practically completed, and, apparently upon this theory, the standing committee of the War Department Claims Board has expressed the opinion that they should be so treated. The evidence before this Board does not support such a conclusion. Certain of the spare parts, such as wings, had much work remaining to be done. Other portions, such as wheels and tires, on which the claimant had done no work except to purchase them already manufactured and cause them to be inspected and approved by the Government, remained in claimant's possession completed as component parts of spares, but needing to be assembled before they became complete spares. It is the practice under the supply circulars, when a contract is suspended before completion, to make a settlement by the payment of all costs and expenses with compensation for manufacturer's services, but without including the item of profit which is ordinarily involved in the contract price. What the manufacturer might have accomplished within the time which the

contract gives him to complete his manufacture is regarded as a limitation of the amount, but not as a measure of the amount he is entitled to be paid. It is assumed that the conclusion of the standing committee of the War Department Claims Board on this question was based upon evidence that, the contract for spares being practically complete, the spares were accepted by the Government officers as complete. The evidence subsequently presented to this Board indicates the facts to be otherwise. The question as to what settlement should be made may be answered, therefore, by assuming the spares contract incomplete and taking up the several items of the claim seriatim:

9. *Item 1.*—"Profit and bonus on spares—Contract No. 2538—in addition to allowance already made, \$14,165.08." The bonus on the spares contract is dependent upon the actual cost of manufacture. The actual cost can be determined only after including therein such amounts as are allowed under items 3 to 9, inclusive, of the claim. This item, "Profit and bonus on spares," will, therefore, be reserved until the remaining items of the claim are determined.

10. *Item 2.*—Additional bonus—Contract No. 2365—due to the delay of the Government in delivering motors, \$13,451.06. It is asserted that claimant's production was delayed some three months by the Government's failure to deliver motors on time and by the fact that many of the motors when delivered required repairs. The contract contains no express provision as to the time of the delivery of the motors. It requires the contractor to deliver planes with motors installed at specified dates. By implication, therefore, it requires the Government to deliver the motors to the contractor early enough to enable it to install them in time to meet its required deliveries of finished planes. In the absence of any express provision fixing damages for delays in delivering motors the claimant would be entitled to its actual damages directly caused it thereby.

11. The contract contains, however, an express provision that if, solely by reason of the failure of the Government to furnish motors in time, the acceptance of any plane is delayed beyond 10 days, the contractor shall be paid \$228 of the \$240 specified as its fixed profit, and shall be paid when it installs the motor the remaining \$12. If the Government's delay in delivering the motor shall exceed 90 days, the remaining \$12 of the fixed profit shall then be paid to the contractor. This provision for the protection of the contractor in the event of the Government's delay having been set forth expressly in the formal contract, there can be no implication that the contractor is entitled to anything further on this account. The item for the additional bonus, \$13,451.06, was, therefore, properly disallowed by the New York district board of claims.

12. *Item 3.*—Charges back, \$7,834.20. Both the New York district board of claims and the Claims Board, Air Service, allowed these items as proper expenditures made in good faith and approved at the time by the approval officer at the claimant's plant. The item seems to be a proper allowance as a part of the actual cost of production, and should be included in the amount found due the claimant.

13. *Item 4.*—"Executive salaries after October 15, 1918, \$13,483.30." This claim comprises the salary of the president at the rate of \$1,250 a month; of the vice president, production manager, and treasurer at the rate of \$833.33 per month; and of the secretary at the rate of \$25 per week for a period of five and a half months from October 15, 1918, to April 1, 1919, and the salary of the general manager at \$625 per month from October 15, 1918, to December 24, 1918. These salaries at these rates had been approved and paid by the Government as part of the overhead during the performance of the contract. The district board of claims found that the president should receive but half salary after January 1, 1918, which cut the total allowance to \$11,764.55. The half salary that board refused to allow may fairly be regarded as an expense of collecting this claim, and as such was properly disallowed. It appears from the affidavits of three Government officers who had to do with the accounting that it was necessary for the claimant to retain these officers for the purpose of advising the Government in the preparation of accounts. It does not appear whether this was due to the inherent difficulties of the accounting under a contract of this character or whether it was due to the failure properly to keep books while production was progressing. It is not improbable that, the company being a new organization, brought together in war time and under great stress, the bookkeeping difficulties were greater than normal.

If under all the circumstances it appeared the delay in accounting was due to the contractor's fault, the allowance claimed for overhead should be further cut down. The evidence does not so indicate. The President of the company, Mr. John Maynard Harlan, testifies that he was "drafted" for this service to the accounting officers of the Government, and that he and others of the claimant's organization were almost daily in conference with these Government officers. The final voucher was not issued until April 11, 1919. That was subsequently disapproved by the Air Service Claims Board, and the contract is still suspended, awaiting settlement, and the claimant has no other business on which its overhead can be applied. Inasmuch as the evidence shows not only the necessity for the services of claimant's organization, but that these services were required by the Government in connection with the suspension of the contract, the allowance made by the New York district

board of claims is deemed proper, and this amount should be included in the settlement as a part of the expense of production.

16. *Item 5.*—Plant protection, \$635.27. This plant protection appears to have been furnished entirely for the Government's benefit as a part of the expense of production, and as such should be allowed.

17. *Item 6.*—Traveling expenses, \$596.45. These expenses were incurred by one or more of claimant's organization in trips to aviation fields for the purpose of instructing men in the use of Penguins. They do not relate to production under this contract. Whether they may be allowable under some other kind of claim this Board does not determine. It is clear that the item should not be allowed under the claim in question.

18. *Item 7.*—Garage bill, \$78. The evidence shows that this is an aggregate of certain items for gasoline other than that purchased when claimant's trucks were away from the plant and ran short, and that sound economy required the purchase to be made as a part of the expense of production under the contract. The item should accordingly be allowed.

19. *Item 8.*—Freight on dope, \$73. It appears that dope for the wings had been ordered before suspension of the contract and that the freight on shipment and reshipment was expended by the claimant in pursuance of the order "to cancel all the material." This should be allowed.

20. *Item 9.*—Rental of typewriters and adding machines, \$146.50. This also was an expense of production. The evidence shows that the rental was less than would have been the depreciation on the machines had they been purchased outright. This should be allowed.

21. Reverting to item 1, "Profit and bonus on spares," it will be noted that the bonus was figured by the Air Service Claims Board after allowing items 7, 8, and 9 of the claim, and that this Board has directed the allowance of the further items 4 and 7, aggregating \$11,842.55. These items, which were allowed as costs of production, when added to the cost of production as figured by the Air Service Claims Board, will reduce by a like amount the saving in manufacture effected by the claimant. On this saving 25 per cent was allowed the claimant by the Air Service Claims Board, and this 25 per cent being figured on an amount which is \$11,842.55 less than the original, will be reduced by one-fourth of that amount, namely, \$2,810.64. Assuming the correctness of the determination of the claim by the Air Service Claims Board at \$6,167.42, the result of the decision by this Board will be to credit the claimant with \$11,842.55 and charge it with \$2,810.64. The difference between these two amounts, \$9,031.90, added to the claim as allowed by the Air Service Claims Board, will make the total \$15,199.33.

22. There seems to be a doubt as to whether the item which forms the basis of the computation of the Air Service Claims Board, \$125,184.53, is "actual cost expended on spares (part of which were only 80 per cent complete)," or whether it is "actual cost of spares (part of which were only 80 per cent complete), computed on the basis of 100 per cent completion at the unit prices established and shown by the Government accountant in schedule 1 of public voucher No. 106." Whether this amount is the amount actually expended in the manufacture of spares or whether it includes the amount which it would have been necessary to expend to complete the manufacture of spares this Board can not safely undertake to determine from the record; but the question can be easily determined by the Claims Board, Air Service, and if an error has been made in computation it can be rectified by that board.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Mr. Price concurring.



JUNE 12, 1920.

**Case No. 2216.**

*Rehearing in re CLAIM OF AMERICAN CAN CO.*

**1. ORAL AGREEMENT—WHEN NOT MERGED IN WRITTEN CONTRACT.—**

Where there is an oral agreement between a manufacturer and the Government that claimant will be awarded a contract for the manufacture of a certain number of articles, and it is understood that special machinery will be necessary in order to manufacture such articles and the number of articles to be manufactured is fixed as an inducement for the manufacturer to enter upon the production of such articles, and thereafter a formal contract is entered into covering a portion only of the articles, and on account of the armistice orders for the balance of the number agreed upon are not given, there is no merger of the oral agreement into the written contract.

**2. SAME.—**Where a claimant, under the circumstances stated in syllabus 1, has completed the delivery of that portion of the articles for which it had orders, and has been paid therefor, in order for the Government to determine whether or not the claimant is entitled to additional compensation an audit should be made of the amount theretofore paid claimant and claimant should be allowed only such additional sum, if any, as will amortize the fall in value of the special equipment plus proportion of claimant's overhead as is properly chargeable to the uncompleted portion of the articles agreed to be furnished.

**3. CLAIM AND DECISION.—**Claim under the act of March 2, 1919, in the name of the American Can Co. for the H. W. Cotton Co., for \$37,306.57 for special facilities for the manufacture of firing locks. Held, on rehearing, an agreement within the meaning of said act.

Lieut. Col. McKeeby writing the opinion of the Board.

This case was heard by the Board of Contract Adjustment December 17, 1919, and an opinion rendered on February 2, 1920, and upon petition of claimant a rehearing was granted in order to permit claimant to present evidence of an alleged oral agreement.

Thereupon the case came on for rehearing and from the evidence submitted at said rehearing the Board finds the following to be the facts:

**FINDINGS OF FACT.**

1. The claim is clearly a class B claim, arising under the act of March 2, 1919.

2. The Liberty Ordnance Plant at Bridgeport, Conn., in the early part of 1918 was operating under an order for 246 5-inch naval guns, breech mechanisms, and firing locks and spare parts thereof. This plant having been commandeered by the Ordnance Department,

United States Army, the Chief of Ordnance, on April 4, 1918, entered into a contract with the American Can Co., by the terms of which contract the American Can Co. agreed to operate said plant under the supervision and control of the Chief of Ordnance, and the Ordnance Department of the Army undertook through the American Can Co. to carry out the contract with the Navy Department above referred to.

3. During the production it developed that the execution of the Navy's order might be expedited by subletting the firing locks, and on August 5, 1918, the following letter was addressed to the operating management:

"1. Following is an excerpt from bureau letter referred to above:

" 'It is suggested that these locks can be more expeditiously completed if certain parts are sublet to manufacturers capable of doing high-grade work. Provided rapid delivery of these locks can be obtained in this manner, this bureau is preparing to increase the present contract by from 500 to 1,000 locks, depending upon the rate of output.'

"2. This refers to the matter which the undersigned took up with Mr. Hugo a week ago to-day and on which this office has had no reply to date.

" F. FARREL, JR.,  
" *Lieutenant, U. S. N. R. F.*,  
" *Asst. Naval Inspector of Ordnance.*"

And in another letter from Lieut. F. Farrel, jr., assistant naval inspector of ordnance to the operating management, the following statement is made:

"As previously advised by the bureau, they will want all told at least one thousand (1,000) firing locks and spare parts in proportion to the present spare-parts list which the company now has on order."

4. After various conferences it was determined that subcontracts for the firing locks required should be let to the H. W. Cotton Co. (Inc.), and on August 29, 1918, a conference was held in Bridgeport, Conn., at which conference there was present H. W. Cotton, on behalf of the H. W. Cotton Co. (Inc.); Theo. R. Hugo, general manager of the American Can Co.; Lieut. C. A. Anderson, jr., Ordnance Department, United States Army; Lieut. F. Farrel, jr., Ordnance Department, United States Navy; and a Mr. Fox, an accountant for the Navy. In regard to this conference Mr. H. W. Cotton testified:

\* \* \* "At that time we were awfully busy with other work, particularly work for the Bethlehem Steel Company, and we could not see our way to take on this work for the firing locks with our present facilities. It would necessitate purchasing additional equipment; just what amount could not be determined at that meeting. I was finally urged to take the work in hand and requested to pur-

chase the necessary equipment to manufacture the locks. After agreeing to do so, the question of number was involved, but because the deliveries were requested to be made at the rate of fifty, I think, a week, with an equivalent number of spare parts, which, to the understanding of everyone there, made practically 100 firing locks per week, to take on this volume of work would mean pushing aside work which we had in process then, which I was willing to do if the firing locks were more urgently needed than the work which we had in hand, but I stated that I could not take on a small quantity of the firing locks, because they would soon be finished up at the rate of delivery and would leave the plant idle, and if I would set other work aside I would be unable to take it up again, and the result would be our plant would be in idleness.

"It was then stated by Lieutenant Farrel and Lieutenant Anderson that the Government would require from 1,000 to 1,500 firing locks, and as Lieutenant Farrel had placed an order with other parties for firing locks, he felt positive that we would get an order for at least 1,000 of the firing locks, with an equivalent number of parts.

"I then finally agreed to start work on the firing locks if I would be assured of receiving an order for 1,000 locks. This assurance was given to me, and later the contract which the Liberty Ordnance had then for 369 was transferred, or, rather, a new contract made, between the American Can Company and ourselves for 369 locks, with an added clause at the bottom that they could from time to time increase that order or place additional orders for firing locks under the same terms." \* \* \*

5. At that meeting a rough draft was prepared of the agreement then made, and in detail a proposed contract for 369 firing locks to apply on a Navy contract for 246 5-inch naval guns, paragraph 7, contained the following language:

"Contractor will agree to start deliveries within 40 days after the signing of the contract and will agree to deliver at the rate of 20 a week three months from date of signing the contract and will agree to make deliveries at the rate of 50 a week at the end of four months after date of signing of contract. H. W. Cotton Company agrees to the above with the understanding that this order be increased to at least 1,000 firing locks and spare parts."

6. On the same date, August 29, 1918, Lieut. Farrel transmitted to the Bureau of Ordnance, Navy Department, Washington, D. C., the memorandum of the proposed contract, and in the letter of transmission the following paragraphs appear:

"2. It was agreed that the H. W. Cotton Company was the best available organization uncovered to date with whom to sublet the 369 firing locks, at present on order with the American Can Company (Liberty Ordnance Plant), and the additional 631 firing locks and proportionate spare parts by which number the bureau wishes to increase its present order.

"7. It is the understanding of the assistant naval inspector of ordnance that the bureau will increase its present order of 369 complete firing locks with spare parts by 631 additional firing locks with

proportionate spare parts through order on Army Ordnance and in turn the American Can Company (Liberty Ordnance Plant), with the request that all of the firing-lock work be sublet to the H. W. Cotton Company.

"8. As it is understood that this arrangement will be satisfactory to the bureau, the Army Ordnance, the American Can Company, and the H. W. Cotton Company, the assistant naval inspector has, in order to expedite production of the above firing locks, requested the American Can Company (Liberty Ordnance Plant) to deliver to the H. W. Cotton Company all materials on hand at present at the earliest possible moment, in order to get production started, and the H. W. Cotton Company agreed to start on the work immediately on receipt of these materials and pending formal signing of the contract between them and the American Can Company (Liberty Ordnance Plant), the preliminary details of which have been mutually and satisfactorily agreed upon.

"10. It is also the understanding that the Navy Department will furnish the H. W. Cotton Company, through the American Can Company, such additional drop forgings as are necessary to complete 1,000 firing locks and spare parts and such necessary steel and other raw materials as are necessary, which the company may find it is unable to purchase in the open market."

7. In a report signed by Theo. R. Hugo, general manager, the American Can Co. (Liberty Ordnance Plant), which was transmitted along with the above-mentioned letter of Lieut. Farrel, the following language is used:

"The H. W. Cotton Co. propose to undertake the manufacture of not less than 1,000 firing locks complete, together with the usual number of spare parts, and on the basis of this quantity propose to add to their existing equipment for this work the following:

"12 #2 Brown & Sharpe plain milling machines or equivalent.

"3 #2 Brown & Sharpe vertical milling machines or equivalent.

"4 #2 Pratt & Whitney or Garvin Co. profiling machines.

"3 polishing stands and necessary equipment, and will ask for an A-1 priority certificate on the first two items above, claiming that they can get immediate delivery on items 3 and 4.

"Under which condition they propose and agree to begin manufacturing on a toolmaker's basis at once on such parts as are sent them semifinished and for which there are no tools—this to obtain immediate production—and then as quickly as possible to put into operation such tools as are available and in sequence to get into strictly manufacturing production basis. In the meantime they will design, make, and put into immediate sequence such tools as are not available."

And on the same date, to wit, August 29, 1918, the following letter was written by Lieut. Farrel to the American Can Co.:

"Subject: Shipment of materials for firing locks to the H. W. Cotton Company, Brooklyn, N. Y.

"1. Confirming verbal conversation, it will be agreeable to this office for you to deliver to the H. W. Cotton Company, of Brooklyn,

N. Y., at the earliest possible moment materials for the Mark XIV, mod. 1 firing locks, which they are to complete on proposed subcontract, without waiting for the formal papers in connection with this subcontract to come thru.

"2. Direct authority for this letter to you has been obtained from the Bureau of Ordnance, Navy Department, by telephone prior to writing this letter.

"3. The bureau advises that immediately on receipt of this office report on the conference to-day, the bureau will request the Army to request the American Can Company to increase the order for firing locks to 1,000 locks, with proportionate spare parts, including the 369 locks and spare parts now on order."

8. In accordance with the understanding reached at this conference, the American Can Co. forwarded at once to the H. W. Cotton Co. (Inc.), Brooklyn, N. Y., the forgings and material which were on hand at the Bridgeport plant, and the H. W. Cotton Co. began preparing to carry out the agreement, and under date of September 24, 1918, a formal contract between the H. W. Cotton Co. (Inc.) and the American Can Co. was entered into for the manufacture and delivery of 369 firing locks and spare parts for 5-inch naval guns and was approved by the Chief of Ordnance, United States Army, and article 18 of this contract provides as follows:

"Eighteenth. The buyer may from time to time during the performance of this contract place additional contracts with the seller for such quantities of firing locks and spare parts as may be desired by the buyer, and said additional contracts shall embody the same terms and conditions as are embodied herein, except that deliveries thereunder shall be at the rate of at least fifty (50) firing locks and proportionate number of spare parts per week from the completion by seller of deliveries theretofore contracted for by the parties hereto hereunder, and buyer agrees to execute and perform such contracts."

9. On September 7, 1918, the Navy Department, Bureau of Ordnance, addressed the following communication to the Ordnance Department, United States Army:

"Formal request has been made as shown by inclosure (a) for the modification of order under requisition 980, covering 100-5-inch gun, to provide for the furnishing thereunder of 631 additional firing locks complete, with spare parts.

"This matter has been discussed at some length by the bureau's representative with the operating management and the naval inspector of ordnance, and it has been tentatively agreed that the whole number of firing locks required to be furnished under requisitions Nos. 979 and 980, as now proposed to be modified, will be procured under subcontract with the H. W. Cotton Company as the most expeditious method on account of the lack of adequate facilities for their production directly in the Liberty Ordnance Plant.



"The completion of this arrangement, it is understood, will be satisfactory to your office and awaits only formal modification of requisition 980 and instructions as herein outlined to the operating management (American Can Company), Liberty Ordnance Plant.

"The Bureau of Ordnance will appreciate any necessary action in this connection being taken at an early date, as these firing locks are a vital requirement and are most urgently needed for issue to the service."

10. On September 11, 1918, the Navy Department, Bureau of Ordnance, advised the naval inspector of ordnance, Liberty Ordnance Plant:

"1. In accordance with reference (a) the bureau has taken up with the Ordnance Department of the Army the question of subletting of all firing-lock work originally placed with the Liberty Ordnance Company, and also for increasing this work by an additional order for 631 complete locks and spare parts, so that the H. W. Cotton Company will manufacture 1,000 complete Mark XIV mod. 1 firing locks and spare parts.

"2. The Naval Gun Factory has been informed of this arrangement, and has been requested to furnish all necessary forgings, etc., entering into these locks."

11. On September 17, 1918, the following letter was written by the Secretary of the Navy to the Secretary of War:

"Reference (b) is quoted in full, as follows:

"It is requested that bureau requisition No. 979, placed with Army Ordnance, be modified to provide for the furnishing of 631 additional firing locks complete, with spare parts, at an estimated cost of \$330.00 each, under the same appropriation as appears on the requisition.

"It is requested that this matter be given early attention, as these firing locks are very urgently needed. This matter has been taken up and tentatively agreed upon with Army Ordnance in an effort to expedite production as soon as formal order is placed."

"In accordance with reference (b) it is requested that Ordnance Bureau requisition No. 971 be so modified as to include the 631 additional firing locks complete with spare parts.

"Request will be made upon the Secretary of the Treasury to transfer the additional amount of the estimated cost of this order to the credit of the War Department, on the books of the Treasury, under the appropriation named."

12. On September 23, 1918, the following letter was addressed to the American Can Co. by P. F. Hill, ensign, United States Naval Reserve Force, assistant naval inspector of ordnance:

"1. The Bureau of Ordnance, Navy Department, has notified this office that it is its intention to furnish all of the drop forgings and other raw materials required for the manufacture of the 631 additional Mark XIV, mod. 1 firing locks and spare parts to be manufactured by the H. W. Cotton Company, of Brooklyn, N. Y."



13. On October 16, 1918, Lieut. F. Farrel, jr., United States Navy, wrote to the American Can Co.:

"1. The Bureau of Ordnance, Navy Department, Washington, D. C., has advised this office that the Navy Department made a requisition on the Army to increase the order for firing locks by the amount of (631) firing locks, Mark XIV, mod. 1, and spare parts therefor.

"4. You are requested to take the matter up with the officials of Army Ordnance in this district to see what can be done to expedite matters and it is further requested that you advise this office of the result, so the Bureau of Ordnance can be advised in turn."

14. On October 31, 1918, R. A. Bruce, lieutenant colonel, Ordnance Department, United States Army, Ammunition Section, wrote the American Can Co.:

"1. This office is in receipt of memorandum from the Bureau of Ordnance, Navy Department, as follows:

"2. 'The bureau desires that the operating management of the Liberty Ordnance Plant be directed to bend its efforts toward the early completion of such gun constructions as are in process, even though this procedure may interfere with the placing in process of additional gun and breech mechanism parts.

"'It is further desired that no additional purchases of equipment or other material be made for the present excepting for such items as are essential to the completion of gun constructions which are well advanced at this time.'

"3. It is desired that operations at the Liberty Ordnance Plant comply in all respects with the wishes of the Bureau of Ordnance, Navy Department, and you are requested to issue instructions to this effect."

15. On November 2, 1918, the Artillery Division, Office of the Chief of Ordnance, advised its representative, Maj. B. A. Franklin, Bridgeport district production office, that they had been unable to discover any information about the order for the extra 631 parts referred to in the above correspondence and that the same was apparently lost and that they had requested the Naval Bureau of Ordnance to send duplicate of same.

16. On November 19, 1918, Lieut. C. A. Anderson, jr., production officer, Liberty Ordnance Plant, Bridgeport, Conn., wrote Mr. Theo. R. Hugo, general manager, American Can Co.:

"1. It is the request of the Navy Bureau of Ordnance through this office that you instruct the H. W. Cotton Company immediately to cancel all their outstanding orders for machine-tool equipment which is to be used in the making of the firing locks on their order from you.

"2. It is further requested that you advise them that at the present time they will not receive an order for 631 additional locks and for them to proceed in the manufacture of 369 only. There is a possibility that the Navy Bureau of Ordnance may increase the order to 500, but they are not to act on this assumption.

"3. This office requests that it be advised by the Cotton Company through you how many machines they have purchased for this work, the number of these already received, and the number still due, together with a description of the same."

17. In a letter of June 26, 1919, from the Navy Bureau of Ordnance to the Chief of Ordnance, War Department, the *Navy Bureau of Ordnance* recognized the existence of an agreement for the 631 additional firing locks, subparagraph (b) reading as follows:

"(b) That in view of the department's not having placed the order for the additional locks originally agreed to, the department place a proprietary requisitions with the H. S. Cotton Company for machinery ordered for this contract to the value of approximately \$36,257.86 (about 63% of the order), the bureau receiving the machinery covered by this amount at this invoice price. This machinery has not been used."

18. The H. W. Cotton Co. was permitted to complete the formal contract for 369 firing locks and spare parts.

19. No formal contract was ever issued covering the 631 firing locks and spare parts and no work was done thereunder except possibly some small amount of work in connection with the handling of certain material for the said 631 parts which was shipped from the navy yard to the Cotton plant.

20. The claimant alleges that on the 29th day of August, 1918, an agreement was entered into between the claimant and the Government whereby the claimant was to manufacture and furnish to the Government 1,000 firing locks and spare parts; that acting upon the faith of this agreement the claimant prepared the machinery necessary for such manufacture and that owing to the cessation of hostilities claimant was not able to perform the work and to amortize the machinery so purchased and that the Government was obligated to reimburse claimant for actual expenditures made in preparing to perform the said agreement.

21. When the claim was first presented to the Bridgeport district ordnance claims board it was the impression of that board that the same was strictly a class B claim and would have to be validated, but later the said board revised its opinion and decided that under the contract between the Government and the American Can Co. that the claim could be treated as a commitment of a subcontractor and could be set up and audited and paid under such contract, and there was paid to the American Can Co. the sum of \$44,578.80 on account of the instant claim, which amount was in turn paid by the American Can Co. to the H. W. Cotton Co. (Inc.), and the Bridgeport ordnance claims board requested the Board of Contract Adjustment to return the papers in the instant claim to them. This request was denied by the Board of Contract Adjustment and the following reason assigned:

"2. With reference to your request for withdrawal of the claim of the American Can Company from consideration of this Board, it is

not believed advisable for this action to be taken at the present time. The papers in connection with this claim would not indicate that there was an express or implied agreement on the part of the Government's agents, whereby this claimant was led to believe that it would receive an order for 631 firing locks. In view of this fact it would not appear that there was a contract for the 631 firing locks. For this reason and for the additional reason that the claimant referred to this Board for a decision as to whether or not there was liability upon the part of the Government to reimburse this claimant for expenditures it alleges to have made on the strength of the agreement, it is not believed that the Board should return the papers in the claim without some decision as to the merits of same. The Board will soon be in a position to make its decision, and you will be notified of the final action taken by this Board."

#### DECISION.

1. It is not thought that the Board of Contract Adjustment is called upon to determine whether the Bridgeport ordnance claims board erred in settling this claim under the terms of the contract existing between the United States Government and the American Can Co.

2. It is the opinion of this Board that the sole question for determination by this Board is whether or not an agreement such as prescribed by the act of March 2, 1919, was entered into between the claimant and an officer or agent acting under the authority, direction, and instruction of the Secretary of War or of the President.

3. The opinion of this Board of February 2, 1920, denied relief on the ground that the formal contract dated September 24, 1918, merged therein all previous negotiations. This opinion was founded upon insufficient evidence, all of the facts and the documentary evidence not being before the Board. It is clear from the evidence that there was no merger; that the formally executed contract of September 24, 1918, did not contemplate nor attempt to cover the terms of the oral negotiations. It was simply a method of carrying out in part the terms of the oral negotiations.

4. It was clearly and distinctly understood by all parties and is evidenced in unmistakable terms by the letters written on the date of the conference, August 29, 1918, that the H. W. Cotton Co. (Inc.), through the American Can Co., were to receive orders for 1,000 firing locks and spare parts, and that an order would issue as soon as convenient for 369 firing locks and spare parts, which was the number necessary for the 264 five-inch guns then in process, and that in due course a formal order or orders would issue to cover the remaining 631 firing locks and spare parts, and the contractor was instructed to prepare for the manufacture of the entire 1,000 firing locks and spare parts.

5. The letters quoted from in the statement of facts are the best evidence and establish clearly the existence of an express agreement

It is therefore the opinion of this Board that an agreement within the purview of the act of March 2, 1919, was entered into on August 29, 1918, between the Government and the American Can Co. for the manufacture and delivery to the Government of 1,000 firing locks and spare parts for the use of the United States Navy; that a formal contract providing for 369 of said 1,000 firing locks and spare parts was entered into and has been performed; that by reason of the cessation of hostilities no formal order or contract was issued whereby claimant could be reimbursed for expenditures made or obligations incurred in preparing to manufacture the said additional 631 firing locks and spare parts; and by the terms of the agreement thus entered into the United States is obligated to amortize and reimburse the claimant for expenditures made in providing the equipment enumerated and expressly stated to be necessary at the time of entering into the agreement, on August 29, 1918, to wit:

“ 12 #2 Brown & Sharpe plain milling machines or equivalent,  
“ 3 #2 Brown & Sharpe vertical milling machines or equivalent,  
“ 4 #2 Pratt & Whitney or Garvin Co. profiling machines,  
“ 3 polishing stands and necessary equipment,

and such proportion of claimant's overhead as may be properly chargeable to the uncompleted part of the work to be undertaken.

7. That the former decision of this Board, rendered on February 2, 1920, be, and the same is hereby, revoked.

8. It being further the opinion of this Board that the claimant under the terms of the agreement found to exist is entitled to amortization and reimbursement solely upon the equipment specifically mentioned and such proportion of overhead as may be properly chargeable thereto; that an audit should be made of the \$44,578.80 paid claimant, and should such sum exceed the amount properly chargeable to the Government under this decision, then and in that event the excess, if any, so found to exist be refunded to the Government.

9. That certificate C will issue.

#### DISPOSITION.

1. The Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Averill concurring.

JUNE 16, 1920.

**Case No. 2223.**

*In re* **CLAIM OF FOUR WHEEL DRIVE AUTO CO.**

1. **LABOR-DISPUTES CLAUSE—SUBCONTRACT.**—Under a labor-disputes clause providing for an addition to the contract price as a part of the settlement of such disputes “in the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries” the contractor may be entitled to such an addition to the contract price even though the disputes occurred in the plant of a subcontractor, where the price of articles furnished by the subcontractor was increased by reason of the settlement of such disputes by the War Labor Board and where the contractor was required to pay such additional cost under the provisions of its subcontract. The fact that the required notice of the occurrence of the disputes was given to the Secretary of War by the subcontractor instead of the contractor is immaterial. (Citing Cohen, Goldman & Co., Nos. 2169 and 2182.)
2. **CLAIM AND DECISION.**—This claim for \$8,196.37 was filed under the act of March 2, 1919, with the Claims Board, Director of Purchase, and by that Board referred to the Board of Contract Adjustment as a class B claim. The claim is for increased labor costs arising in the performance of a formally executed contract for motor trucks. Held, claimant is entitled to recover.

Mr. Patterson writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. Statement of claim, Form A, was filed with the Ordnance Claims Board June 30, 1919, and by that Board referred to the Claims Board, Director of Purchase. The claim comes to this Board by letter of November 6, 1919, from the Claims Board, Director of Purchase, having been construed by that Board as a class B claim arising under the act of March 2, 1919. Such, however, is not the case, as will appear from the findings of fact hereinafter recited.
2. Under date of May 22, 1918, the Four Wheel Drive Auto Co., a Wisconsin corporation, entered into a contract with the United States, through Lieut. Col. Charles N. Black, Ordnance Department, for 22 sets of spare parts for four-wheel drive 3-ton truck chassis, at \$40,800 per set, a total of \$897,600. Said contract was numbered War-Ord. P. 8399-1457 Me.

3. On or about July 10, 1918, the said Four Wheel Drive Auto Co. entered into another contract with the United States, through Capt. E. B. Cooper, Ordnance Department, United States Army, for—

(a) 2,270 four-wheel drive auto 3-ton truck chassis, including installation of driver's seat tops;

(b) 130 four-wheel drive auto 3-ton truck chassis with searchlight generators and installation of driver's seat tops, etc.;

(c) Obsolete tire molds;

(d) 20 sets spare parts;

at prices therein specified, totaling \$8,994,383.29. Said contract contained the following clause:

*"ART. XX.—Adjustment of labor disputes.*

"In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, or the Secretary of War or his representative shall have requested the contractor to submit such dispute for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or his representative in making such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be made therefor;" \* \* \*

"If such settlement reduces such labor costs to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

"No claim for additions shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative, and such addition to the contract price was directed as part of the settlement."

This contract was numbered War-Ord.-P 9420-1567 Me.

4. Under date of July 11, 1918, the said Four Wheel Drive Auto Co. entered into another contract with the United States, through Lieut. Col. William Williams, Ordnance Department, for—

800 chassis standard four-wheel drive model B, 1917, 3-ton, equipped as therein specified, at the price of \$3,777.56 (subject to revision as provided in Article Xa of said contract), a total of ----- \$3, 022, 048. 00

This contract was numbered War-Ord.-P 10570-1704 Me.

5. For the performance of the above contracts the Four Wheel Drive Auto Co. placed with Merchant & Evans Co., of Philadelphia, Pa., orders for the requisite number of Hele-Shaw clutches and Evans alignment joints. These were patented articles manufactured



only by Merchant & Evans Co. and were essential to the performance by Four Wheel Drive Auto Co. of its contracts. The subcontract contained the following clause:

"It is expressly understood and agreed that the prices above are made on a reduced-profit basis upon orders certified by the purchaser to be for the United States Government and/or its allies, and it is further understood and agreed that in the event that the cost of our labor shall advance or decrease during the life of this contract, the price of any unshipped portion is to be advanced on decreased-plus overhead thereon, plus 10% profit; and, further, that purchasers' Government priority certificates are to be furnished to us, so that we in turn may secure priority on our supplies."

6. In the month of September, 1918, a dispute arose between the Merchant & Evans Co. and its workmen, and the latter struck or threatened to strike. Similar labor difficulties arose at the same time in other plants in Philadelphia engaged upon work for the Ordnance Department. Under date of September 11, 1918, the following communication was sent to the Secretary of War:

"SEPTEMBER 11, 1918.

"The Hon. SECRETARY OF WAR:

"The undersigned request the National War Labor Board to assume jurisdiction over the dispute between the employees of the companies now striking and have agreed to abide by its findings.

"We request the War Department to act for us in bringing this dispute to the attention of the War Labor Board.

"MERCHANT & EVANS Co.,

"JAMES D. EVANS, *Vice Pres.*

"CARLSON-WENSTROM Co.,

"JOHN L. CARLSON, *President.*

"A. H. FOX GUN Co.,

"C. A. GODSHALK, *Vice Pres.*

"J. F. JOHNSON & Co.,

"JOHN F. JOHNSON, *Owner.*

"CRUISE & SLATTERY,

"By JOHN H. CRUISE.

"WILLIAM G. KELTON,

"*Business Representative, Inst. Asso. of Machinists.*"

7. Under date of September 18, 1918, the Chief of Ordnance wrote the Secretary of War that disputes had arisen in certain plants in Philadelphia engaged in ordnance work between the machinists and toolmakers and their employers over the question of wages; that in several cases where strikes had actually occurred the return of the workmen had been secured by agreement to submit the matter to the War Labor Board and further strikes had been prevented by the same means; that such a serious condition threatened that it was believed that the War Labor Board should assume jurisdiction over the plants which had signed the agreement, which included those signing the foregoing communication and also Emerson En-

gineering Co., and requesting that the Secretary submit these cases to the War Labor Board for action and decision.

8. On the same date the Acting Secretary of War, by Maj. B. H. Gitchell, wrote to Messrs. William H. Taft and Frank P. Walsh, joint chairmen of the National War Labor Board, requesting them to take jurisdiction over the plants affected.

9. The National War Labor Board was originally appointed by the Secretary of Labor, and the appointment confirmed by the President by proclamation dated April 8, 1918. Its members were nominated by a war labor conference board appointed in June, 1918, by the Secretary of Labor for the purpose of devising for the period of the war a method of labor adjustment which would be acceptable to employers and employees. The President's proclamation defines the powers, functions, and duties of the War Labor Board, as follows:

"To settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays and obstructions in which might, in the opinion of the national board, affect detrimentally such production; to provide, by direct appointment or otherwise, for committees or boards to sit in various parts of the country where controversies arise and secure settlement by mediation and conciliation; and to summon the parties to controversies for hearing and action by the national board in the event of failure to secure settlement by mediation and conciliation."

10. No request was made by Four Wheel Drive Auto Co. for the intervention of the National War Labor Board in connection with the dispute in the factory of Merchant & Evans Co., nor does it appear that the former was asked formally or otherwise to request such intervention.

11. The National War Labor Board assumed jurisdiction over the dispute between the companies mentioned, including Merchant & Evans Co. and their employees, and made an award, as a result of which Merchant & Evans Co. was required to pay and did pay to its employees the sum of \$8,196.37 in excess of what it would have been required to pay for labor upon the articles manufactured by it for Four Wheel Drive Auto Co. under its subcontract with the latter by its scale in effect prior to the award of the National War Labor Board.

12. The Four Wheel Drive Auto Co., in compliance with the terms and conditions of the contract with Merchant & Evans Co., paid the latter the sum of \$8,196.37 as representing the increased labor cost under the award of the National War Labor Board, and now seeks to recover this sum from the United States under Article XX of contract No. War Order P-9420-1567 Me, this being the only one of the three contracts mentioned which contains the so-called "labor clause." In

this connection, it further appears from a letter of the Washington representative of claimant, dated May 4, 1920, that this claim is based on said contract War Order P-9420-1567 Me, the other two contracts having been entirely completed.

13. It also comes to the attention of this Board, and the information is confirmed by the letter referred to in Finding 12, that a claim is now pending before the Claims Board, Director of Purchase, for settlement and adjustment of contract No. War Order P-9420-1567 Me, which contract was suspended before completion.

#### DECISION.

Clause XX of the contract in question, upon which claim is based, does not stipulate that a labor dispute, if any, must necessarily arise within the plant of the Four Wheel Drive Auto Co. in order to entitle claimant to be reimbursed for increased labor costs, but in this particular is broader and more liberal in that it provides:

“In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries \* \* \*,” etc.

The dispute forming the basis of this claim actually arose in the plant of a subcontractor, but was such a condition as would most assuredly have interfered with the performance of the contract had it not been adjusted. The articles purchased by claimant from subcontractor and which it required in the performance of the contract were patented articles and could not be procured elsewhere. The only particular in which it might be argued that there was any failure of a complete compliance with Clause XX of the contract is that the request for an adjustment of the labor dispute did not originate with claimant, but with a subcontractor not a party to the main contract. In view of the fact that, as pointed out above, the operation of the labor-dispute clause was not limited to the contractor's own plant, and that time was of the essence of the contract, this fact is considered immaterial. Under the facts and circumstances as detailed in the findings the Secretary of War is invested with the discretion to direct a fair and just addition to the contract price of the articles furnished by claimant to the Government under its contract, and the claimant is entitled to an award thereof.

The principles set forth in the decision of this board in the cases of Cohen, Goldman & Co., Nos. 2169 and 2182, are applicable and controlling of the instant case.

#### DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Capt. Morgan concurring.

JUNE 17, 1920.

Case No. 1461.

*In re* CLAIM OF HOROWITZ & MOSKOWITZ (INC.).

**1. THEFT OF GOVERNMENT MATERIALS—CONSTRUCTIVE POSSESSION.—**

Where claimant, a corporation, was manufacturing clothing from cloth furnished by the Government and its contract provided that it should be liable for any loss of such cloth while in its possession, and where some of the cloth was delivered to a truckman hired by claimant to haul it to its factory and was sold by such truckman and an employee of claimant company to outside parties and the proceeds shared by the truckman and others, including the vice president of claimant company, held, that claimant corporation had acquired constructive possession of such goods and was liable for the loss thereof by theft or otherwise under the provisions of its contract. Held, further, it was also liable, aside from the provisions of its contract, under general principles of law.

**2. SAME—EXTENT OF LIABILITY.—**Under the above circumstances the Government is entitled to reimbursement for all Government goods which agents of claimant corporation converted while they were acting within the scope of their authority. Claimant's liability is not limited to such goods, as the conspirators were found guilty of stealing in criminal proceedings, but applies to all goods which claimant's agents were able to obtain because of their connection with the corporation or which were turned over to them for the purpose of the corporation's contracts with the Government.

**3. SAME—TORT—CRIME.—**A corporation is liable for the torts of its agents acting within the scope of their authority and it makes no difference that the torts constitute a crime, since the old doctrine that felony merges a tort is no longer the law. It is immaterial that the proceeds of the thefts went to the conspirators and not to the corporation.

**4. CLAIM AND DECISION.—**Claim under the act of March 2, 1919, for \$26,689.24, based upon a proxy-signed contract for O. D. breeches. The claim was referred to this Board by the Claims Board, Division of Purchase, for an opinion as to certain questions pending completion of an audit and survey. The claim is remanded to the Claims Board for further proceedings in accordance with the principles stated in the opinion.

Mr. Henry writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic

Division Supply Circular No. 17, 1919, for \$26,689.24, by reason of agreements alleged to have been entered into between the claimant and the United States. The claim was referred to the Board of Contract Adjustment by the Claims Board, office of Director of Purchase.

2. The claimant is a corporation organized in 1917 under the laws of the State of New York, with a capital stock of \$10,000, of which \$5,000 has been paid in in cash. It was organized by Hyman Horowitz and Edward Moskowitz for the purpose of securing and performing Government contracts, and particularly the contract on which this claim is based. They were financed for the most part by Samuel W. Moskowitz, brother of Edward. Edward Moskowitz became president of the corporation, Horowitz vice president, and Samuel A. Atlas treasurer. Horowitz received no stock, at least no more than one share, but the agreement was that he would receive one-third of the profits of this contract when completed. Horowitz's son Benjamin was employed by claimant.

3. A proxy-signed contract, No. 9065, was entered into between the claimant and the Government on October 22, 1917, for the manufacture by the claimant of 150,000 olive drab woolen breeches at 84 cents each. The material was supplied by the United States. Performance of the contract was begun and many breeches had been finished and delivered when, in January, 1918, it was discovered that Hyman and Benjamin Horowitz, acting in association with a sponger named Davidson, who was one of the proprietors of the Universal Cloth Shrinking and Refining Works, and a truckman named Sherman, had been stealing and selling Government cloth. Sherman confessed and turned State's evidence. Davidson was indicted and pleaded guilty. The two Horowitizes were indicated on six counts, tried and found guilty on counts 1 and 6, and sentenced to three years at the United States Penitentiary at Atlanta, Ga. Their conviction has been affirmed on appeal to the circuit court of appeals for the second circuit. Immediately after the arrest of Hyman Horowitz he resigned as vice president of the claimant corporation.

4. The two counts on which the Horowitizes were convicted charged them with unlawfully selling and applying to their own use 10 pieces of woolen cloth and 10 bales of cotton drill. There were two other counts, on which the jury disagreed as to Benjamin Horowitz, in spite of the evidence that he shared in the loot, namely, the second and fourth, involving 10 and 24 pieces of woolen cloth, respectively. The evidence in the criminal proceeding and also at the hearing before this Board showed that the goods were stolen before actual delivery to claimant's factory. It appears, however, that the truckman Sherman was hired by claimant to haul the goods on which the first count of the indictment was based from Davidson's establish-

ment, and the goods on which the sixth count is based from a Government warehouse. Sherman receipted for the woolen goods on behalf of claimant and hauled them to his stables, where he and Benjamin Horowitz removed 10 pieces and took them to the shop of a man named Weinstein, who later paid Hyman Horowitz \$1,500 for the goods, and also certain other goods, the evidence as to which was ruled out by the trial court. As to the cotton goods, it appears that Benjamin Horowitz and Sherman were sent to a Government warehouse by Hyman Horowitz to obtain the goods and deliver them to a man named Teitz; that Sherman receipted for the goods on behalf of claimant; that Benjamin Horowitz rode with the truck and delivered the 10 bales to Teitz; and that some days later Teitz paid Hyman Horowitz \$1,457.26 for the 10 bales, comprising 10,400 yards.

5. The evidence showed that a considerable quantity of cloth was stolen by the conspirators but not from the actual or constructive possession of claimant company. It also appears that much of the stolen cloth has been recovered by the Government from the possession of those to whom the thieves had sold it. None of the money which was paid for the stolen goods was received by claimant. All of it appears to have been divided among the conspirators, including the Horowitzes.

6. The Government decided after the discovery of the crime to suspend performance of the claimant's contract, to remove its goods from their factory, and to allow no more breeches to be made by the claimant. All the piece goods and uncut materials were removed. It was found, however, that large amounts of cloth had been cut and that thousands of breeches were partly finished. It would have been difficult and expensive for the United States to have taken away the cloth that had been cut and the partly finished breeches and have the balance of the work done elsewhere.

7. Prior to his arrest Hyman Horowitz was in direct charge of the work under this contract, and it would appear that Edward Moskowitz took no part in the criminal acts described above, although his absence in Europe prevented his appearance at the hearing held by this Board. His brother, Samuel W. Moskowitz, consented to advance the money needed to finish the uncompleted breeches if the Government determined that it was advisable that that should be done. It appears that he is one of the two sureties on a bond in the sum of \$63,000 for the performance of the contract.

8. Capt. Neil D. Jackson had charge of the matter for the Government, and after the piece goods had been removed he recommended that the claimant be allowed to complete the unfinished garments. Col. Nixon, his superior, adopted his recommendation, and the claimant was directed to proceed to use up the material that had been cut



and to finish up its contract so far as it could do so with the cloth then in its possession.

9. The claimant proceeded in accordance with directions and completed and delivered breeches, for which it claimed it should be paid under the contract \$33,063.84. The United States has paid \$6,374.60 and concedes that it owes the balance except for the following offsets or counterclaims:

Item 1. Excess of Melton used over allowance, \$11,786.84.

It appears to be admitted by the Government representatives that there were deliveries of breeches which should be added to their figures, and that the amount of this item is about \$7,000 too large for that reason. It is contended by the claimant that the balance of the charge is wrong; that no change at all should be made; and that if an excess of material was used, it should be charged for as rags at 40 cents a yard, instead of as uncut cloth at \$2.75 a yard.

Item 2. Twenty-two thousand five hundred and one and two-eighths yards of cotton cloth, at \$0.368 per yard, \$8,280.40.

The Government is not sure but that the figures should be 11,800 yards, while the claimant says the entire item should be struck out.

Item 3. Excess of the silesia used, 2,043½ yards, at \$0.18½ per yard, \$383.23.

One of the Government witnesses stated that this item was probably a mistake, as the Government allowance of silesia was too small.

Item 4. Theft of cloth and drilling, \$10,827.69.

Total of the four items, \$31,278.16.

10. The Government auditors and survey officers had not completed their investigations in respect of this claim at the time of the hearing, and it was stated that the figures given in the items of counterclaim were tentative only and subject to revision.

#### DECISION.

1. The only definite issue now before this Board is as to item 4, the counterclaim for the theft of cloth and drilling. As to items 1, 2, and 3, no final determination either favorable or unfavorable to the claimant has been made. The testimony of the Government witnesses indicates that it is not unlikely after further investigation that the amount of the Government's counterclaim will be very greatly reduced. In so far as claimant has been furnished material in excess of authorized allowances, it should be made to account therefor and proper deductions should be made from the amount the Government owes the claimant.

2. As to item 4, all that this Board can do in the present state of the evidence is to lay down the principles which should be applied by the bureau board.

3. As to such Government material as came into the actual or constructive possession of claimant, the claimant corporation is responsible therefor. It can not excuse itself by alleging that it is not responsible for the crimes of the agents. It specifically bound itself in the following terms:

“The contractor shall be held liable for any loss of or damage to any of the materials furnished by the Quartermaster Corps, from any cause whatsoever, while in his possession.”

Such contract provision is broad enough to obligate claimant to make good the loss to the Government even if the goods were stolen by strangers and without fault on the claimant's part.

4. We believe further that even without such a sweeping contract obligation that claimant would be liable. The wrongful taking of cloth under the circumstances of this case constitutes both a crime and a tort. The old doctrine that a felony merges a tort is no longer the law.

5. As to the goods which came into the possession of claimant and were stolen by its own servants the tort was one for which the corporation was clearly responsible. It is unable to excuse itself by showing that it was not negligent. In the first place it was negligent, and in the second the act was done within the scope of the authority of the servants for which the principal is responsible regardless of negligence in the choice of servants. The theft in this case was the act of the vice president and manager of the corporation. The president had almost nothing to do with the management. Hyman Horowitz himself was in full control. There could not be a clearer case of bringing the act home to the corporation. It is immaterial that the conspirators put the proceeds of their thefts into their own pockets instead of into the corporation's coffers. Further, when goods were delivered to the conspirators in the name of the corporation, and they signed for them in such name, they were acting within the scope of their authority as agents of the corporation, and the latter is responsible for their torts.

6. As to any Government material stolen by the conspirators, which was not actually or constructively delivered to the corporation, the application of the rule may be more difficult. We have not sufficient facts before this Board to make the application. The principle is: Was the agent acting within the scope of his authority? When Hyman Horowitz and his coadjutors stole the goods, were they acting in the name of the corporation? Were they able to get possession of the material because of their connection with the corporation and was the material turned over to them for the purpose of the Government contract of the corporation? If so, the claimant is responsible. If, on the other hand, the thefts had nothing to do with their work

or connection with the corporation—if it was done outside of working hours, and entirely independent of the contract or work of their principal—the latter is not liable.

7. It has been suggested by claimant that if it is responsible at all for the thefts its responsibility should be limited to such goods as the court, in the criminal proceedings, found the criminals guilty of. That is not the correct rule. It often happens that only a very few of the articles stolen by an accused are selected by the prosecuting attorney for prosecution. The Government in this case is entitled to reimbursement for all Government goods which agents of claimant converted while they were acting within the scope of their authority.

#### DISPOSITION.

This opinion will be submitted to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield concurring.

JUNE 17, 1920.

**Case No. 2491.**

*In re* **CLAIM OF THE WESTERN INDUSTRIES CO.**

- 1. SUSPENSION OF CONTRACT — COMMITMENTS — REIMBURSEMENT.**—The United States Government is not obligated to reimburse claimant for loss sustained in commitments made before the performance of a contract unless it is shown that such commitments were the consequence of, or were made in reliance upon, such contract.
- 2. CLAIM AND DECISION.**—This claim for \$33,047.96 is an appeal from the Contract Review Board and is presented upon the theory that the Government is obligated to reimburse claimant for loss sustained on commitments. Held, claimant not entitled to relief.

Mr. Bryant writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Contract Review Board denying a claim on a formal contract between the claimant and the Government, numbered 1863, dated October 21, 1918, for 200,000 gallons of ethyl alcohol 190 degrees proof at 52.5 cents per gallon f. o. b. Agnew, Calif.

2. Under the terms of the contract delivery of 150,000 gallons was to be made in January, 1919, and the balance in February, 1919.

3. The claimant was notified to suspend all production on this and other contracts, some time about the middle of December, 1918. The claimant does not allege that it manufactured any alcohol under this contract.

4. Ethyl alcohol is a product of molasses. The claimant, in the course of its business, was accustomed to purchase molasses on long-time contracts. Under the terms of these contracts the claimant was obligated to take over periods of years the entire product of various molasses producers. The earliest contract, which was in the course of performance at the time the contract in this case was entered into between the claimant and the Government, was dated in 1910. Subsequently to that date the claimant entered from time to time into other contracts. All contracts for molasses were executed before the contract between the claimant and the Government was either contemplated or signed. Under these contracts the claimant was constantly receiving supplies of molasses.

5. The claimant testified that to produce 200,000 gallons of ethyl alcohol 190 degrees proof required approximately 2,900 tons of molasses. The claimant received under its contracts for molasses approximately 4,600 tons in September, 1918; 4,400 tons in October, 1918; 2,300 tons in November, 1918; and 6,000 tons in December, 1918. During the period prior to the armistice the claimant was engaged to its full capacity in the performance of private contracts and in part performance of a small Government contract not now in question. After the armistice the claimant continued to produce alcohol. While the stock of molasses on hand was constantly shifting, the claimant alleges that at all times it kept on hand in its storage tanks, after entering into contract No. 1863 with the Government, sufficient molasses to perform its Government contract, and it refrained from applying this molasses to private contracts.

6. Upon the declaration of the armistice the demand for ethyl alcohol became very much less, and eventually within a few months practically disappeared. The price of ethyl alcohol descended rapidly. The claimant, in order to make as little loss as possible, turned its capacities into the production of denatured alcohol. This was manufactured from its molasses on hand, but at a loss from what it would have realized had it been able to turn its molasses into ethyl alcohol and to sell it at the price fixed in the Government contract and also at a loss from what the molasses had actually cost the claimant.

7. The price of molasses also went down in the market after the armistice, until, by December 11, 1918, according to the claimant's statement, there was practically no market for molasses.

8. The present claim is based on the theory that the Government should reimburse the claimant for the cost of 2,900 tons of molasses which would have been necessary for the performance of the Government contract, less what the claimant has been able to realize by reasonable efforts in manufacturing denatured alcohol and selling the same.

9. The claimant, in connection with the case, filed an affidavit of Mr. Naryancki under date of February 25, 1919, in which he states: "We did not buy molasses specifically for these contracts. We had molasses on hand."

#### DECISION.

1. There is no termination clause in the claimant's contract. Settlement should be made under the regulations established by the War Department.

2. It is well settled that the Government does not reimburse the claimant for raw materials except such as have been procured for the

performance of the contract. The original commitments of the claimant in this case were incurred long before the contract was entered into. The claimant's counsel has argued that the delivery and acceptance of molasses under contracts previously made amounts to a purchase and sale on the date of delivery, and that, therefore, molasses delivered to the claimant after the signing of its contract with the Government was in effect a purchase by the claimant of the molasses after the making of the contract.

3. The general purpose of Supply Circular No. 111, of 1918, and Supply Circular No. 19, of 1919, and other regulations and orders governing the settlement of contracts is to make compensation to the claimant for such commitments and expenses as it has incurred in reliance on Government contracts. It is clear in the present case that the claimant would have been obliged to receive the same amount of molasses whether it had entered into the present contract or not. The question is not as to the exact time when the purchase or sale may be said to have taken place, whether before or after the contract was entered into, but rather whether the claimant in reliance on a Government promise has suffered a loss either by reason of the purchase of materials or by contracting for such purchase.

4. The commitment was entered into by the claimant long before the Government contract, and the purchase, if it may be said theoretically to have taken place after the date of the Government contract, was not a consequence of or made in reliance upon such contract, but the result of the obligations of the claimant already entered into.

#### DISPOSITION.

Final order will enter denying relief to the claimant.  
Col. Delafield and Mr. Hopkins concurring.



JUNE 17, 1920.

**Case No. 2066.**

***In re* CLAIM OF RUSSIAN REMINGTON RIFLE CONTRACT TRUSTEES.**

- 1. MACHINERY—PROCUREMENT ORDERS—OPTION.**—Where it is doubtful whether the Government had an option which it could enforce under a certain contract, it is unnecessary to determine that question under the facts of this case, since if it had such option the issue of a procurement order covering the property affected by the purported option constituted an acceptance thereof, and if the Government did not have such option the procurement order and the subsequent conduct of the other parties to the contract in acquiescing to the terms of the procurement order and in consenting to an appraisal of the property constituted an acceptance of the offer contained in the procurement order.
- 2. CONSTRUCTION OF CONTRACT—CERTAINTY OF TERMS.**—Where a contract provides that the Government may purchase all machinery required for the manufacture of rifles and machine guns, such provision is not void for indefiniteness if in the same instrument there is a provision for selection by the Government of such machinery as it desires at prices to be fixed by appraisers to be appointed as therein provided, as the rule of *id certum est quod certum reddere potest* applies.
- 3. SUPPLEMENTAL CONTRACT—CONSIDERATION—BILL OF SALE, EFFECT OF.**—Where a contract, binding only upon claimant on account of its informality, is executed and substantially performed and afterwards a bill of sale purporting to be a formal contract is entered into, it does not have the effect of a formal contract, because it was not in the interests of the Government to bind itself in a matter wherein the claimant was already bound.
- 4. MISTAKE—ERRORS IN CALCULATION.**—Where there are apparent errors of calculation in a void bill of sale showing the result of the work of the appraisers of certain machinery purchased by the Government of claimant, and subsequently an instrument purporting to correct the bill of sale is drawn up and approved, such instrument, if the calculations therein are correct, constitutes evidence of the operation and carrying out of the agreement between the parties and it should be used by the Claims Board in determining the rights of claimant to compensation.
- 5. CLAIM AND DECISION.**—Claim for \$95,227.38, under the act of March 2, 1919, for balance due under contract of sale for certain machinery. Held, claimant entitled to recover as stated in the opinion.

Mr. Henry writing the opinion of the Board.

**FINDINGS OF FACT.**

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic

Division Supply Circular No. 17, 1919, for \$95,227.38, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The Russian Remington Rifle Contract Trustees is the correct name of the persons to whom had been conveyed prior to January 2, 1918, the title to machinery, machines, and various kinds of equipment located at the plant of the Remington Arms Union Metallic Cartridge Co. in Bridgeport, Conn. They will hereafter be called the Trustees. Their power and duties are set forth in a series of agreements bearing date of January 2, 1918, a printed copy of which is in evidence, to one of which the United States is a party. In one of the agreements there appears the following provisions:

(7) "Prior to the sale of any of said machinery or inventory to any other person, the Trustees shall offer the same to the United States and the United States shall have an option to purchase the same or any part thereof if it shall make known its desire to make such purchase within thirty days after it receives said offer. The purchase price, if it cannot be agreed upon by the Trustees and the United States, shall be fixed by arbitrators, one arbitrator to be chosen by each party and a third arbitrator by the two arbitrators so chosen, if said two arbitrators are unable to agree."

3. The United States decided in February, 1918, to avail itself of its option on such of the Trustees' machinery and equipment as should be required for the manufacture of Browning machine guns, Colt pistols, and the Pederson Device. A Procurement order was sent to the Trustees on or about February 20, 1918, a copy of which follows:

[War Department Procurement Division 6th & B Sts. NW. Office of the Chief of Ordnance Washington, D. C. Procurement Order War-Ord-P 2822-1484a. P. Work Order Form of Contact. Important. In reply refer to War-Ord. File Symbol P412.34/1096.]

The contract covering this order will be prepared immediately upon receipt of the Contractor's acceptance indorsed on the copy forwarded herewith. By formal contract.

Firm: Henry S. Kimbell, Wm. Wallace, jr., R. Poliakoff, Col. F. W. Abbott, Trustees for the Russian Government, as indicated in letter.

Address: 120 Broadway, New York, N. Y.

Order for: Machine Tools and Machinery.

Price: To be determined later.

SIRS: 1. I am directed by the Acting Chief of Ordnance to hereby give you an order for the machine tools located at the plant of the Remington Arms Union Metallic Cartridge Co., Bridgeport, Conn., but owned by the Russian Government and placed in the hands of four (4) trustees for sale.

2. The United States will purchase all of such machine tools and machinery which can be utilized and may be required for the manufacture of rifles and machine guns.

3. The value of the machine tools and machinery is to be fixed by appraisers, one appointed by and representing the United States—the other appointed by and representing the Trustees for the Russian

Government. The basis of the appraisal shall be the market value as of to-day, where such is ascertainable, and if not so ascertainable, the cost price of such machine tools or machinery plus the average increase or decrease in value of machine tools of generally similar character the market value of which can be ascertained. From such market value shall be deducted depreciation in accordance with the percentages indicated on pages 78 and 79, under the heading "Schedule M" of the Supplemental Agreement between the Russian Government and the Remington Arms Union Metallic Cartridge Co. (Inc.), dated September 10, 1917. A copy of said schedule is hereto attached.

4. In case only a part of any machine tools can be utilized for the manufacture of rifles and machine guns, and the value of such part, as fixed by the appraisers, is less than 80 per cent of the value of the complete machine tool, the Trustees may elect to retain such machine tool and dispose of it elsewhere, as they deem fit.

5. Delivery at the plant of the Remington Arms Union Metallic Cartridge Company, Bridgeport, Conn., of the machine tools and machinery will be made immediately upon the completion of the appraisal thereof.

6. Any communication in connection with this procurement order should make reference to P 2822-1484A. You are requested to notify this office of your acceptance of the enclosed copy. This order and your acceptance thereof indicated as above will constitute a verbally and binding contract on both parties.

Respectfully,

(Signed)

SAMUEL McROBERTS,  
*Colonel, Ordnance, N. A.*

4. Schedule M, attached to this procurement order, contains a list of percentages of depreciation, which should be applied in case claimant's property was purchased by the United States. It is the same Schedule M that is found on pages 78 and 79 of the printed Exhibit B, entitled "Supplemental Agreement," dated September 10, 1917.

5. Mr. Percy Brotherhood was appointed on March 1, 1918, to represent the United States in the appraisal of the machinery, machine tools, and other items of facilities which belonged to the Trustees. Mr. William Rothen, of Henry Prentice (Inc.), represented the Trustees in the appraisal. Mr. Brotherhood reported to Col. Charles N. Black, of the Procurement Division of the Ordnance Department, on August 13, 1918, the result of his appraisal and handed Col. Black the prices that had been arrived at, together with a schedule of the machinery which had been taken over by the United States. This machinery was listed and is described in Schedule A, which was attached to an instrument executed by the United States and the Trustees, and dated October 7, 1918, by the terms of which the United States agreed to pay the Trustees the sum of \$3,047,473.35.

6. The important portion of the instrument of October 7, 1918, is the following:

"Now, therefore, know ye, That the undersigned, Henry S. Kimball, Wm. Wallace, jr., Col. F. W. Abbot, and R. Poliakoff, Trustees, created and constituted under and in pursuance of the provisions of said 'Terms of Settlement' and said 'Agreement of Trust,' hereinbefore referred to, and both whereof bear date as of January 2, 1918, and deriving their power and authority therefrom, and in pursuance of the authority vested in them as such Trustees under the said Agreement of Trust, do hereby sell, assign, transfer, and convey unto the United States of America all of the machines, machinery, tools, appliances, structures, and equipment of every kind, character, name and description mentioned, named, enumerated, or described in Schedule A attached hereto and made a part hereof; all of which machines, machinery, tools, appliances, structures, and equipment are located and situated at and in the plant of said Remington Arms Union Metallic Cartridge Company, Incorporated, at Bridgeport, Connecticut; and possession of all, and of each and every part thereof, is hereby delivered to the United States of America.

"For the machines, machinery, tools, appliances, structures, and equipment mentioned, recited, or described in said Schedule A delivered to and accepted by the United States hereunder the United States covenants and agrees to pay to said Trustees the value thereof as ascertained and fixed by said appraisers and shown on said Schedule A, but subject to depreciation as likewise shown on said Schedule A; the total amount payable hereunder, however, not to exceed the sum of three million forty-seven thousand four hundred and seventy-three  $35/100$  (\$3,047,473.35) dollars. Payment thereof to be made promptly upon the presentation of a certificate of a proper representative of the United States, showing delivery to the United States of the machines, machinery, tools, appliances, structures, or equipment for which payment is demanded."

7. The instrument, dated October 7, 1918, also contains in the second paragraph quoted the recital that the United States "covenants and agrees to pay to said Trustees the value of the machines, etc.," as ascertained and fixed by the appraisers and shown on Schedule A. It is signed by the Trustees and in behalf of the United States by Lieut. Col. Charles E. Black. Schedule A, annexed to the instrument of October 7, contains 301 typewritten pages, in which are found a description of the machines, etc., their number, the prices, the percentage of depreciation, and the net value, which is the appraised value. In addition there are three pages in which the appraisal is summarized and indexed. The summary shows 5,190 machines, plus 12 other machines, which are listed on the preceding page.

8. It was found after the instrument of October 7, 1918, was executed that many errors had been made in addition, subtraction, and multiplication in figuring the amounts called for in schedule A. There were errors also in stating the number of machines that had been appraised, in stating the kind of machine, in the unit prices and in the percentages of depreciation. There were machines listed on a sheet in the schedule marked "No. A" on which at the time of the

appraisal tentative prices only had been placed, or, as to which the proper percentage of depreciation had not been determined. Errors were found in respect to 78 different items. The errors have all been examined by the appraisers for both parties and the correct computations are stated in a list entitled "Corrections to Russian Schedule A as of January 6, 1919," which is signed by Mr. Brotherhood and Mr. Rothen with the indorsement "All corrections approved." This list shows that a correction of the mistakes would increase the amount of the total of schedule A by \$95,227.38.

9. Thirty-three of the errors were in favor of the Trustees in that they would increase the amount due them, while 45 errors are in favor of the United States in that they would decrease the amount due from the United States. The largest single item in which there was a mistake in figuring is that shown on page 196 of schedule A. This item reads:

Riflers for hook cutter, P. & W.:

Quantity-----	71
Unit price-----	\$1, 650. 00
Total price-----	11, 715. 00
Depreciation, 12½ per cent-----	1, 464. 37
Net value-----	10, 250. 68

It should read:

Riflers for hook cutter, P. & W.:

Quantity-----	71
Unit price-----	\$1, 650. 00
Total price-----	117, 150. 00
Depreciation, 12½ per cent-----	14, 643. 75
Net value-----	102, 506. 25

In other words, the person who multiplied 71 machines by the unit price of \$1,650 per machine made the result \$11,715. The real result should be \$117,150. The mistake was in placing the decimal point. It does not appear whether the mistake was originally made in multiplication or whether the clerk in copying the schedule misplaced the decimal point at that stage. A similar mistake in the placing of a decimal point is found on page 91, where the depreciation is given as \$132 instead of \$1,320. In this instance a correction will decrease the amount to be paid by the United States by \$1,188. So also on page 122 a mistake in placing a decimal caused a total of \$1,077.30 in favor of the Trustees, and on page 231, where a misplaced decimal gave a total to be paid of \$1,235.25 in excess of the correct total.

10. The largest single item of mistake in favor of the United States is in connection with page 77 of schedule A, in which eight plain grinders, B. & S., at \$1,600 each, gave a result according to schedule A of \$28,800; the true result is \$12,800, and the difference in favor of the United States, after deducting the depreciation, is \$13,440. All

the other mistakes are of the same character as those which have been specially mentioned.

11. It is not in dispute that both Col. Black and Col. Hawkins, who had this matter in charge, intended that the sum to be stated in the instrument of October 7, 1918, should be the correct total of schedule A, and that schedule A should conform to the correct appraisal, and the intention of the Trustees was the same. The mistakes that were made are not surprising in view of the size of schedule A, the number of machines listed, and the varying percentages of depreciation.

#### DECISION.

1. The first question to be determined is what was the effect of the provision quoted above in paragraph 2 of the "Findings of Fact." Was it a provision for the benefit of a third party? Did it give the United States an option on all of the machinery to which the trustees had title, or a right to require the trustees to turn over to the United States such portion of the machinery owned by them as the United States should call for? It is the opinion of this board that it did give the United States such an option. The matter, however, is not entirely free from doubt. It could be argued that the Government was not given an option which it could exercise at any time, but that such an option would only arise in case the trustees contemplated the sale of the property and offered it to the United States. In view of what followed, however, our holding on this point is not necessary for a determination of the question, and we do not base our decision solely upon it.

2. The United States, in the exercise of what it believed to be an option in its favor, in February of 1918 issued the procurement order quoted in paragraph 3 of the "Findings of Fact." If the Government did have an option, the issue of the procurement order constituted acceptance of the offer. If it did not have such an option, the procurement order was an offer and the subsequent conduct on the part of the trustees in acquiescing in the agreement as shown by their cooperation in the appraisal of the property constituted the acceptance.

3. The procurement order of February, 1918, embodied the terms of an agreement between the trustees and the United States within the meaning of the act of March 2, 1919. It may be suggested that the procurement order is not sufficiently definite, that it does not contain all of the terms of the agreement. In paragraph 2 of the procurement order it is said, "The United States will purchase all of such machine tools and machinery which can be utilized and may be required for the manufacture of rifles and machine guns." What machinery the Government would select was still to be determined. But the maxim applies in this case *id certum est quod certum*



reddere potest. The means were provided in the agreement for making definite both the articles to be purchased and the price. Claimant agreed to allow the United States to select all of the machinery for the manufacture of rifles and machine guns that it desired, and to accept the prices fixed therefor by the appraisers appointed in the manner designated by the agreement.

4. The question as to when the title to the articles the subject matter of this contract passed is immaterial for our purposes. The contract for the sale was complete long before title passed and is in no way dependent upon it. It is true that it was necessary for the selection of the articles to be made and for them to be appraised before the rights of the claimant could be determined. But in this case the selection and the appraisal have taken place, and that difficulty has been removed.

5. The next question is as to the effect of the instrument of October 7, 1918. It purported to be a bill of sale, and also to be a formal contract. As a formal contract it is void, because the rule is that when the United States is a party to an informal contract it is not to its interest thereafter to give the contractor a better right by means of a formal contract. Especially is this so where the informal contract has been substantially performed. As a bill of sale the instrument did not have the effect of passing title. The title of such machinery as was selected and appraised before the bill of sale was issued passed when it was selected, set aside, and appraised. The title to such machinery as had not yet been selected and set aside by October 7, 1918—and it appears there was some within that category—did not pass until it was selected and set aside. The instrument of October 7, 1918, must therefore be regarded as an attempt to put into writing, for the purpose of evidence and payment, the result of the labors of the officers who selected the machinery for the Government and the labors of the appraisers.

6. As it appears that the instrument of October 7, 1918, contained a great number of errors, it should be disregarded. A second schedule entitled "Corrections to Russian Schedule A, as of January 6, 1919," has been drawn up and approved. It apparently states correctly the result of the labors of the appraisers. If so, it constitutes evidence of the operation and carrying out of the agreement as found in the purchase order of February, 1918, and should be used by the Claims Board in determining the rights of the claimant to compensation.

#### DISPOSITION.

Certificate C and a document will be issued by this Board and transmitted with a copy of this opinion to the Ordnance Claims Board for appropriate action.

Col. Delafield concurring.

JUNE 19, 1920.

**Case No. 1523.**

*In re* **CLAIM OF REMINGTON ARMS UNION METALLIC CARTRIDGE CO.**

- 1. AGREEMENTS, INFORMAL, INCREASED FACILITIES.**—Where Government officers, in the course of negotiation of contracts with an arms manufacturer for the massed production of machine guns and pistols, agreed that the manufacturer should be reimbursed the cost of increased facilities necessary for the production required, and in the case of such facilities as are manufactured in claimant's plant should be paid in addition 10 per cent of their cost, the United States became obligated within the purview of the act of March 2, 1919, to pay claimant in accordance with the terms of such agreement for all necessary additional facilities provided by claimant for the performance of the manufacturing contracts in question, either by purchase or by fabrication within claimant's plant.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$2,712,000 arising out of an informal agreement covering facilities for the manufacture of firearms. Held, claim allowed.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,712,000, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The issues before the Board have to do with agreements alleged to have been entered into between the United States and the claimant for the furnishing of facilities for the manufacture of—

- (a) Browning machine guns.
- (b) Colt pistols.
- (c) Pederson devices or .30/18 automatic pistols.

3. These claims and one numbered 1553 by the same claimant, entitled "French Machinery," and also four claims presented by the Russian Remington Rifle Contract Trustees, were heard at the same time and 12 full days were used in presenting the evidence in behalf of the claimants and of the Government. The evidence is voluminous, comprising 1,620 pages of testimony, and exhibits numbering

176. The Remington Arms Union Metallic Cartridge Co. was represented by counsel as were the Russian Remington Rifle Contract Trustees and through their diligence and that of the Government attorney it is believed that substantially all material evidence bearing on the complicated issues has been submitted. We have heard Gen. Crozier, who was Chief of Ordnance and Acting Chief of Ordnance down to the middle of December, 1917; of Gen. Wheeler, Acting Chief of Ordnance from December, 1917, to March, 1918; of Gen. McRoberts, Gen. Rice, Gen. Thompson, Gen. Dickson, Col. Little, Col. Eames, Col. Black, Col. Sheppard, Col. McFarland, Col. Lamont, Col. Hawkins, Maj. Jeffery, Maj. Schultz, Maj. Whittaker, Maj. Russell, Capt. Martin, Capt. Johnson, Lieut. Fowler, and others. The claimant's witnesses testified at length. We had also before us the appraisers who acted for the United States and for the claimant, and the Government's and the claimant's accountants. There was no sharp conflict in testimony either between the claimant's witnesses and the officers of the United States or in the testimony of the officers themselves.

4. The claimant corporation is a combination of the Remington Arms Co. and the Union Metallic Cartridge Co. Both corporations prior to their union had long been engaged in the manufacture of rifles and cartridges. The claimant owned a number of plants, but all the work with which we are concerned was performed at its plant at Bridgeport, Conn. This was a large establishment, and before the entry of the United States into the war the claimant had been engaged in manufacturing rifles at Bridgeport for the Russian Government and for the French Government. The contract with the French Republic was canceled in August, 1916. The claimant continued to manufacture rifles under the Russian Government contract for some time after April, 1917.

#### BROWNING MACHINE GUNS.

5. On July 26, 1917, Gen. William Crosier, Chief of Ordnance, sent a telegram to the claimant asking for a conference concerning the possible manufacture of machine guns. The United States had adopted the Browning machine gun as one of the arms for use in France. This arm had been invented by Mr. Browning not long before this time. A model gun had been made at the Colt Co.'s plant at Hartford, Conn. This gun had never been manufactured in any quantity and a very large production was desired.

6. The claimant company was not at that time in a strong financial condition. Its officers stated to Gen. Crosier and to other officers of the Ordnance Department that it would be unable to manufacture the Browning machine gun except on condition that the United

States should pay for all the necessary additional facilities that would be required. Gen. Crosier assented to this condition—in fact similar arrangements by which the United States should furnish the facilities for the manufacture of Browning machine guns were made with several other corporations. All the officers of the Ordnance Department who were familiar with the arrangements which were made during the summer and fall of 1917 testified that the understanding between the Government and the claimant at the time the manufacture of Browning machine guns was undertaken was that the cost of the increased facilities that were necessary should be borne by the United States, and also that having paid for the facilities the United States should become their owner.

7. The first written directions to the claimant to undertake the manufacture of Browning machine guns submitted to us is a letter of August 4, 1917 (Exhibit 1), signed William Crosier, brigadier general, Chief of Ordnance, by Earl McFarland, major, Ordnance Department, and reads as follows:

WAR DEPARTMENT,  
OFFICE OF THE CHIEF OF ORDNANCE,  
*Washington, August 4, 1917.*

In replying refer to No. C. M. G. 472.543/1.

REMINGTON ARMS U. M. C. COMPANY,  
*233 Broadway, New York City.*

Attention Mr. Kimball.

SIRS: Confirming the conversation in this office between Mr. Kimball, of your company, and General Crosier and Colonel Rice, on the subject of the manufacture at your plant of the Browning recoil operated machine gun, I beg to inform you that it is expected that an order for a total of approximately 10,000 guns of either the water-cooled or aviation type, or both, will be given you as soon as details covering the order can be arranged. In the meantime it is urged that you make as great preparations as may be practicable toward the earliest possible production of these weapons. The Colt's Patent Fire Arms Manufacturing Company has expressed its willingness to assist you in these preparations, and this department is forwarding for the attention of Mr. Pinney, at your Bridgeport Arms Works, photoprints of the preliminary drawings covering the water-cooled gun.

This department stands ready to assist you in every possible way in the manufacture of this material.

WILLIAM CROZIER,  
*Brig Gen., Chief of Ordnance.*  
(Signed) By EARL MCFARLAND,  
*Major, Ordnance Department.*

On September 24, 1917, a purchase order numbered War-Ord-CMG 43 was issued to the claimant, signed by J. H. Rice, lieutenant colonel, Ordnance Department. The order recites that it is in confirmation

of letter of August 4, 1917. It is an order for 15,000 Browning machine guns and standard spare parts and accessories as listed in Exhibit A, which was attached. It recited that the contract to be entered into should contain such usual terms and conditions as may be required by the Ordnance Department. Exhibit A contains 18 items of spare parts. Along with this letter was sent a "Standard Form for Cost and Profit Contract," on which contractors were requested to make marginal notations of necessary changes. Article V of the proposed contract provided that—

"The allowance of the cost to contractor of increased facilities and of the articles for which the United States shall pay, and the elements included in the term 'costs' as used in this contract are as follows:"

Then follow a number of paragraphs in respect to the manner in which costs shall be determined. Article II provides, among other things, that all property paid for by the United States becomes the property of the United States.

On January 21, 1918, the claimant received a telegram, signed "Rice, Army Ordnance," directing the claimant to—

"Make necessary preparations, arrange machines, and procure tools, gauges, and fixtures for doubling the production of Browning guns now contemplated."

This was followed by a letter of January 26, 1918, signed by Col. McFarland, confirming the instructions contained in the telegram of January 21, 1918.

#### COLT AUTOMATIC PISTOLS.

8. This pistol had been made prior to April, 1917, by the Colt Co., but the number of pistols produced per day was trifling in comparison with the number which it was found that the Army would require. The officers of the Ordnance Department conferred with the officers of the claimant company, beginning in November, 1917, in relation to the utilization of the claimant's plant at Bridgeport for the manufacture of this arm in large quantities. The officers of the claimant company stated that it would not be possible to undertake the manufacture of the Colt pistol except on condition that the United States should pay for such increased facilities as were necessary. The officers of the Ordnance Department who were concerned with the negotiations all testified that the arrangement with the claimant company contemplated the payment by the United States for such increased facilities as were necessary and that the Government should own the facilities which it paid for. The negotiations culminated in a letter of December 29, 1917 (Exhibit 8) addressed to the claimant company, as follows:

[B-206, 145 AMH-LIL R 474.6/564.]

DECEMBER 29, 1917.

REMINGTON ARMS U. M. C. COMPANY,  
*Woodward Building, Washington, D. C.*

GENTLEMEN: 1. You are hereby authorized and directed to proceed with the necessary preparations for the manufacture and with the manufacture of one hundred and fifty thousand (150,000) caliber .45 automatic pistols, model of 1911, to be delivered at the earliest possible date.

2. Please acknowledge receipt of this order and furnish schedule of deliveries and price to be incorporated in formal contract with you covering the terms of delivery and payment and containing such other and usual terms as the Ordnance Department may prescribe.

(Signed) C. B. WHEELER,  
*Brig. Gen. Ordnance N. A.,  
Acting Chief of Ordnance.*

This was followed by a letter of January 8, 1918, addressed to the vice president of the claimant company, as follows:

WAR DEPARTMENT,  
OFFICE OF THE CHIEF OF ORDNANCE,  
SMALL ARMS DIVISION,  
*1801 I Street, Washington, D. C., January 8, 1918.*

In replying refer to No. R 474.6/599.

Mr. I. S. BETTS,  
*V. P. Remington Arms UMC Company,  
1026 Woodward Bldg., Washington, D. C.*

SIRS 1. Through direction of the Acting Chief of Ordnance I wish to call attention to the fact that on December 29th you were authorized and directed to proceed with the necessary preparations for and the manufacture of 150,000 caliber .45 automatic pistols, model 1911. This letter is to confirm a verbal understanding that you are to prepare for the production of 1,000 of these pistols per diem.

2. Please acknowledge this letter and advise if the understanding is mutual.

Yours, very truly,

(Signed) E. F. RUSSELL,  
*Major, Ordnance R. C.*

On January 12, 1918, the claimant was informed by the Ordnance Department that it should keep in mind a production of 3,000 pistols per day instead of the 1,000 that had been ordered. On January 15, 1918 (Exhibit 11), the following letter was sent to the claimant company:

[O. O. War Dept. R 413.8/1245. Jan. 15, 1918.]

JANUARY 15, 1918.

Mr. I. S. BETTS,  
*% Remington Arms UMC Company,  
Rm. 1026 Woodward Bldg., Washington, D. C.*

SIR: 1. Supplementing letter of a day or two ago advising you to space your machinery for a total production of pistols of 3,000 per



diem and to take other preparatory steps not calling for an actual expenditure for the same quantity, I am directed by the Acting Chief of Ordnance to further instruct you to assign the necessary machinery for production of 3,000 pistols per diem and to arrange all paper schedules for tools, jigs, fixtures, gauges on the same basis.

2. The whole matter as to quantity production should be settled in a very short time and within a week or two at the outside.

Respectfully,

(Signed)

R. F. RUSSELL,  
*Major, Ordnance, R. C.*

A procurement order was issued under date of March 21, 1918, to the claimant (signed Samuel McRoberts, colonel, Ordnance Dept., N. A., by Chas. N. Black, Lt. Col., Ord. N. A.), in which the claimant was given an order for 500,000 Colt automatic pistols, caliber .45, model 1911. This order, although dated March 21, seems not to have been sent until May 9, 1918. It provided that the pistols should be in accordance with specifications and drawings to be furnished by the Colt. Co.

The plans and drawings which the Colt Co. had used in the manufacture of Colt pistols proved to be entirely inadequate and it was necessary for new drawings to be prepared, entailing many weeks' work. The requirement that all the parts of the Colt pistols should be interchangeable not only with similar parts manufactured by the Remington Co., but with similar parts manufactured by other concerns which were manufacturing Colt pistols was severe and required a perfection and exactness in drawings and manufacture that had not previously been reached.

#### PEDERSEN DEVICE.

9. Mr. John J. D. Pedersen had invented a device called the .30/18 automatic pistol. Experiments with the invention had been made in 1917 and in January, 1918. The Ordnance Department decided that the Remington Co. should manufacture at least 100,000 of them.

10. The negotiations carried on during December, 1917, and January, 1918, in relation to the manufacture by the Remington Co. of the Pedersen Devices culminated in a letter dated January 23, 1918 (Exhibit 5), addressed to the Remington Co. and Mr. J. D. Pedersen. This letter is signed by C. B. Wheeler, Acting Chief of Ordnance, is initialed by Gen. Samuel McRoberts, and shows the signature of Newton D. Baker, Secretary of War, in approval. The letter was accepted as an agreement and signed by the Remington Co. by its president, H. S. Kimball, who also signed as attorney for Mr. Pedersen. This letter constitutes the substance of the agreement entered into between the United States and the claimant company. It reads in part as follows:

"I beg to state my understanding of the agreement reached at our several conferences regarding the manufacture of the so-called Pedersen device.

\* \* \* \* \*

"The Remington Company will proceed as soon as possible to manufacture 100,000 of those devices, including as many magazines as may be desired by the Government as a part of each device, the Government to pay all expenses for the necessary additional machinery, special equipment, and special machinery that may have to be acquired, and all other costs of manufacture, all machinery and equipment provided or paid for by the Government to become the property of the Government.

\* \* \* \* \*

"A formal contract between the Remington Company, Mr. Pedersen, and the Government will be prepared as soon as practicable after this letter has been confirmed by Mr. Pedersen and the Remington Company, and approved by the Secretary of War."

The claimant received the following letter in respect to the letter of January 23, 1918:

FEBRUARY 7, 1918.

GENTLEMEN: I beg to confirm my telephone message of a couple of days ago to Mr. Betts, that the Finance Division informed me that the letter written to your company and Mr. Pedersen under date of January 23rd, and your acceptance of the same, constitutes such a contract as will authorize payments by the Finance Division thereunder, and that you may, therefore, proceed with the work of getting ready to manufacture the Pedersen device. My understanding from Mr. Betts is that you have already started.

Yours, very truly,

(Signed) C. L. McKEENAN,  
*Lt. Colonel, Ordnance, N. A.*

The claimant company proceeded immediately after the receipt of the letter of January 23, 1918, with the preparation for the manufacture of the Pedersen device.

11. One of the matters under discussion in November and December, 1917, between the claimant's officers and the Ordnance Department was as to the sources of the increased facilities and as to the terms under which they should be acquired. The testimony of the officers of the Ordnance Department and of the claimant is to the effect that the understanding was that for all such facilities as were purchased by the Remington Co. from concerns outside its own plant the Remington Co. should be reimbursed the exact amount which it paid out and no more. There was to be no profit to the Remington Co. on what are called outside purchases. The witnesses for the Government and for the claimant agreed in stating that the Remington Co. should receive for such facilities as were manufactured inside its own plant the cost of manufacture as determined by the accepted definitions of cost plus a profit of 10 per cent. In January,

1918, it was determined that the Russian machinery should be purchased by the United States so far as it was necessary for the manufacture of the three arms and that the United States should pay to the Russian trustees the value of the machinery as fixed by appraisers. It was also determined that an appraisal should be made of the French machinery and its value determined by two appraisers, one representing the United States and one the Remington Co.

#### REQUIREMENTS.

12. On February 1, 1918, the requirements for the three arms had been determined and the Remington Co. was engaged in the performance of its agreements. The orders called for the production of 30,000 Browning machine guns and a per diem production by December 1, 1918, of 500 guns. The orders called for 500,000 Colt pistols and a per diem requirement by December 1, 1918, of 3,000 pistols. The orders for the Pedersen device were for 100,000 with a per diem requirement by December 1, 1918, of 2,000.

The requirements for the Brownings were greatly increased from time to time during the spring of 1918 by the issuance of five procurement orders calling for additional base and field spare parts.

#### ESTIMATES AND PROCUREMENT ORDERS.

13. The claimant had been frequently asked by the Ordnance Department to submit estimates of the expected cost of the facilities for the three arms. It had been engaged since August, 1917, in the manufacture of Browning machine guns, since December, 1917, in the manufacture of Colt pistols, and since January 23, 1913, in the manufacture of the Pedersen device, and no figures had been submitted as to the estimated cost of facilities. It had long been the practice of the Ordnance Department to require estimates to be furnished before procurement orders were issued or funds allotted.

14. The officers of the claimant company were reluctant to furnish figures of the estimated cost of the additional facilities that would be required for the manufacture of the three arms at the rate called for by the program which it had undertaken. It was stated to the officers of the Ordnance Department that any estimate that could be made of the cost of additional facilities would be no more than a guess at best, that the Browning machine guns had never been made in quantity by any concern, that the Pedersen device had never been manufactured by anybody, and that mass production of Colt automatic pistols had never been undertaken, that the enormous number of machine guns, pistols and thirty-eightens that were called for in the program made any estimate of the cost of facilities

that would approach exactness impossible, that changes in the design and in the dimensions of the parts of the Browning machine gun were continually being made, that the degree of interchangeability of the parts of the machine guns and Colt pistols had not been fully determined, and that much depended on the claimant having freedom of action in conducting its manufacture of the three arms. The Ordnance officers stated to the claimant that an estimate of the cost of the increased facilities was necessary as a basis for providing the necessary funds. The claimant's letter of February 20, 1918 (Exhibit 19) in which estimates are given, states—

“We have also prepared more comprehensive estimates of the costs involved, although these estimates will still be subject to modifications as conditions of the labor, machinery, and supply markets make them necessary.”

And—

“Naturally the quickest procedure would be the authorization of the total expenditure necessary to complete the special equipment, under the most favorable terms we can obtain, but if such a general authorization is not viewed with favor the next best thing would be the detailing of some officer to be stationed at our Remington Bridgeport Works and clothed with sufficient authority to approve the purchase orders as rapidly as designs and details are completed, which approval should be all that is necessary to insure recognition by the Government accountants and the prompt payment of bills as rendered.”

And—

“We believe the urgency of the case makes the general approval of expenditures for the special equipment most desirable if not absolutely imperative.”

And—

“It should be obvious that if required to materially change our plans and the conduct of our affairs we should not be held responsible for any increase in cost or curtailment of production.

“The urgency for huge production within a phenomenally short time makes imperative immediate action by the different sections and divisions of the Ordnance Department upon the essential matters herein stated, and the approval of the expenditures for machinery and special equipment, buildings, etc., should be given at once in order to avoid further delay.”

On February 21, 1918, a letter was sent to the claimant from the Procurement Division, signed Col. Samuel McRoberts by Lieut. Col. Chas. N. Black, in which it is stated—

“ \* \* \* it being impracticable at this time to determine the unit prices upon which to base said contracts, nor to estimate with any degree of accuracy the amount of money required to be expended in the purchase of machinery and other equipment, and in the re-

quired rearrangement of existing manufacturing facilities, the Remington Arms Union Metallic Cartridge Company is hereby authorized to incur obligations not to exceed \$1,000,000 for increased manufacturing facilities."

On February 27, 1918, the claimant wrote the Ordnance Department stating—

"The development in connection with the manufacture of the Browning heavy-type machine guns has so advanced we can determine the character of machines best adapted to the various operations, but the design of the special tools, fixtures, jigs, gauges, etc., for the manufacture of the .45 caliber automatic pistol, model 1911, and the .30 caliber automatic pistol, model 1918, was begun so recently that any selection of machinery at this time must be considered tentative and subject to revision both as to quantity and price as the development work progresses.

"Owing to the volume and diversity of the special equipment of tools, fixtures, jigs, gauges, cutters, etc., required for the manufacture of the three arms above enumerated, it is impracticable to furnish detailed estimated costs at least until after the lapse of many weeks.

"In our letter to you of the 21st inst. we have given our total estimated cost of this special equipment for each of the three arms and as we have arrived at these totals by computing the composite costs of special equipment we have heretofore made for other arms, we assume them to be sufficiently accurate for appropriation purposes.

\* \* \* \* \*

"We are submitting the attached estimates with the understanding that the items may be modified as and when necessary to economical production and at an increased or decreased cost as may eventuate."

15. In the claimant's letter to the Ordnance Department dated March 19, 1918 [Exhibit 23], it is stated that the preparation of the detailed lists of machine tools and miscellaneous equipment for the manufacture of the three arms has been complicated by the necessity of making estimates before their manufacturing processes have been fully determined. In this letter the claimant mentions items approximating \$400,000 in value which had not been included in its previous estimates. It also estimates additional machinery equipment to be purchased outside as costing \$582,388.50.

16. Attached to the letter of March 19, 1918 [Exhibit 23] is a schedule of six pages showing the machines that were available and the estimated number that would have to be purchased. The total number of machines in this schedule is 4,436. There was also submitted along with the letter of March 19 a schedule covering seven pages in which the tool-room machinery requirements were summarized and the total number of this class of machines is 982. There was also sent along with the letter of March 19 a summary of mis-

cellaneous equipment requirements for the three arms covering six pages, and the total number of machines in this schedule is 594.

17. The letter of February 20, 1918 [Exhibit 19], which is signed by C. C. Tyler, vice president of the Remington Co., states that the United States was expecting the Remington Co. to proceed with the manufacture of the following:

#### ARMS.

.30 cal. Browning machine guns, model 1918: We have been instructed to proceed with arrangements for the production of 500 machine guns daily, with a contract in anticipation for 30,000 guns.

.45 cal. Colt automatic pistol, model 1911: We have been instructed to proceed with arrangements for the production of 3,000 pistols daily, with a contract in anticipation for 500,000 pistols.

.30 cal. automatic pistols, model 1918: We have been instructed to proceed with arrangements for the production of 2,000 pistols daily, with a contract in anticipation for 100,000 pistols.

In the same letter there are references to the ammunition contracts, which are not before us at this time. The letter also says:

We submit in detail below the estimated expenditures at each of our works for additional facilities for each of the orders for arms and ammunition.

#### ARMS.

.30 cal. Browning machine guns, model 1918: Daily capacity specified by the United States Government, 500 daily:

Estimated cost of machinery equipment.....	\$1, 791, 557. 00
Estimated cost of special equipment, tools, fixtures, jigs, gauges, cutters, etc.....	816, 000. 00

Total estimated expenditures for equipment.....	2, 607, 657. 00
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.45 cal. Colt automatic pistols, model 1911: Daily capacity specified by U. S. Government, 3,000:

Estimated cost of machinery equipment.....	1, 582, 926. 00
Estimated cost of special equipment.....	764, 291. 00
Total estimated expenditures for equipment.....	2, 247, 217. 00

.30 cal. automatic pistols, model 1918: Daily capacity specified by U. S. Government, 2,000:

Estimated cost of machinery equipment.....	880, 884. 00
Estimated cost of special equipment.....	550, 000. 00

Total estimated expenditures for equipment.....	1, 430, 884. 00
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The total for the three arms was \$6,285,758.

This letter of February 20 was directed to the small arms section, Production Division, attention of Maj. Hayden Names. On February 21, 1918, a letter was sent to the small arms section, Procurement Division, attention of Maj. E. A. Shepherd, in which the same estimates were given as to the cost of the additional facilities.

18. On March 22, 1918, three procurement orders were issued, one for each arm. They were all signed in typewriting "Samuel McRoberts" and in ink by Chas. N. Black, colonel. They are substantially alike for the three arms except that each order contains the figures for the cost of facilities for each arm that are stated in



the estimates given in Mr. Tyler's letter of February 20 (Exhibit 19). The procurement order for the machine guns follows:

All communications should be addressed to "The Procurement Division, Office of the Chief of Ordnance, U. S., Washington, D. C.

The contract covering this order will be prepared immediately upon receipt of the contractor's acceptance indorsed on the copy forwarded herewith.

[War Department Procurement Division, 6th and B Streets NW. Office of the Chief of Ordnance, Washington, D. C. Procurement Order War-Ord-P4565-13425a. Pro. Doc. 2600. Work Order 2351-26000. Form of Contract FP. Important. In reply refer to War-Ord-P4565-13425a. File. Symbol PS. O. O. War Dept. April 1, 1918. P413.8/923.]

#### SUMMARY.

Date: March 22, 1918.

Firm: Remington Arms Union Metallic Cartridge Co.

Address: 235 Broadway, New York City, New York.

Quantity: ———.

Order for: Machine tool and other equipment for the manufacture of caliber .30 machine guns (heavy type), model 1918 (Browning, water-cooled).

Price: Not to exceed \$2,607,657.

GENTLEMEN: 1. I am directed by the Acting Chief of Ordnance to, and do hereby, give you an order to increase your facilities for the manufacture of caliber .30 machine guns (heavy type), model of 1918 (Browning, water-cooled), to 500 per day, beginning December 1, 1918.

2. The inspection of the material ordered herein will be conducted by the Production Division of the Ordnance Office.

3. Detailed plans covering the proposed procurement and installation of machine tool and other equipment must be submitted by you to and approved by the carriage section of the Production Division, Ordnance Office, before actual expenditures of money are made, and the total cost to the United States of said increased manufacturing facilities shall not exceed \$2,607,657. You are to purchase the facilities herein referred to on the most favorable terms obtainable by you, subject to approval by the contracting officer of the United States.

4. The United States will promptly reimburse you for expenses incurred upon the submission of properly approved vouchers. All machine tools and other equipment thus paid for shall be the property of the United States.

5. The machine tool and other equipment herein referred to is to be purchased and installed at your Bridgeport Works, Bridgeport, Connecticut, at the earliest practicable date.

6. The machine tool and other equipment is to be charged to the Chief of Ordnance, United States Army. You are requested to forward the original and three copies of invoices to the Inspection Division, Ordnance Office, and one copy of each to the Procurement Division, Ordnance Office, both located at 6th and B Streets NW., Washington, D. C.

7. Any communication in connection with this procurement order should make reference to P4565-1342Sa; PS. If you accept this

order kindly wire this office to that effect and endorse and return the enclosed copy in the manner indicated thereon.

Respectfully,

(Stamped)

SAMUEL McROBERTS,  
*Colonel, Ord. Dept., N. A.*  
By CHAS. N. BLACK,  
*Lieut. Col. Ord. Dept., N. A.*

The three procurement orders were accepted by the claimant with reservations.

19. One of the issues before us concerns the construction of these orders as to whether they constituted contracts or parts of contracts, whether they superseded prior oral agreements, or whether they were intended only as a basis for the payment of money to the claimant. Allotments to the total amount stated in the three orders were later made by the finance section of the Ordnance Department providing for payment to the Remington Co. when payments became due of \$6,285,758.

20. Another issue concerning which the amount of testimony taken is not inconsiderable is as to whether or not the Remington Co. exceeded the amounts stated in the three procurement orders and whether the United States knew it had exceeded these amounts and authorized additional expenditures, and also as to the right of the Remington Co. to relief for expenditures beyond the limits stated in the procurement orders if there was such excess.

21. The Remington Co. was required by the Ordnance Department, beginning in May, 1918, to make weekly progress reports which showed in respect to each of the three arms how much the Remington Co. was authorized to expend under the three procurement orders and how much it had actually expended at the date of each report. These reports show that on June 22, 1918, the Remington Co. had gone beyond the allotment for facilities for machine guns; on June 29, 1918, it had gone beyond the allotment for the Pedersen devices, and that on September 28, 1918, it had gone beyond the allotment for the Colt pistols.

22. The Ordnance Department stationed an officer at the Remington Co.'s plant in the early part of 1918, whose duty it was to signify his approval or disapproval of all purchases made by the Remington Co. outside its plant. No claim is made by the Remington Co. for any such purchases as do not carry proof of the approval of the Ordnance Department. The total of outside-the-plant purchases for the three arms is \$3,129,708.55. The total of work done inside the plant for which claim is made under the facilities agreement is \$2,283,209.97. This includes the Remington Co.'s charge of 10 per cent profit. The addition of these two amounts

is \$5,412,918.52. The claim as to French machinery is \$590,552.82. The claim as to French transmission machinery is an additional sum of \$38,057.78. The total as claimed by the Remington Co. is \$6,041,529.12. The total of the three procurement orders is \$6,285,758. The total amount claimed by the Remington Co. is therefore less than the total amount allowed it for increased facilities by the sum of \$244,229.18. In the amounts just stated all items in respect to Russian machinery are eliminated.

23. The situation in respect to the Russian machinery may be briefly stated. As early as January, 1918, the United States had determined to exercise the option granted it by the provisions of the contract of January 2, 1918 (Exhibit 6.) Mr. Percy M. Brotherhood, of the firm of Manning, Maxwell & Moore, was designated as the appraiser to represent the United States, and he was instructed by the Ordnance Department to appraise the Russian machinery at the Remington Co.'s plant in Bridgeport. He began the appraisal in March, 1918, and continued on this work until the fall of 1918. The appraisal as to machines and machine tools was completed on August 13, 1918. The Russian Remington trustees designated Mr. Rothen, of H. E. Prentiss & Co., as their appraiser, and he labored contemporaneously with Mr. Brotherhood. The machines were appraised at their value as of December 31, 1917. The amount of depreciation to be charged had been fixed. The two appraisers agreed as to value.

24. In the meantime a procurement order was issued to the Russian Remington rifle contract trustees, which is not dated, but the evidence shows that it was issued on February 20, 1918. It is signed by Col. Samuel McRoberts and is numbered P2822-1484A. Schedule M, which was attached to this order, showed about 5,190 machines which were to be acquired by the United States, and showed also the percentages of depreciation referred to in the order. This procurement order is as follows:

[War Department, Procurement Division, 6th and B Streets, N. W. Office of the Chief of Ordnance, Washington, D. C. Procurement Order, War-Ord-P 2822-1484A. P. Work Order. Form of Contract. Important. In reply refer to War-Ord-. File. Symbol P412.34/1096.]

The contract covering this order will be prepared immediately upon receipt of the contractor's acceptance indorsed on the copy forwarded herewith. By formal contract.

Date:                      Summary.                      Quantity.

Firm: Henry S. Kimball, Wm. Wallace, jr., R. Poliakoff, Col. F. W. Abbot, trustees for the Russian Government, as indicated in letter.

Address: 120 Broadway, New York, N. Y.

Order for: Machine tools and machinery.

Price: To be determined later.

SIRS: 1. I am directed by the Acting Chief of Ordnance to hereby give you an order for the machine tools located at the plant of the

Remington Arms Union Metallic Cartridge Co., Bridgeport, Conn., but owned by the Russian Government and placed in the hands of four (4) trustees for sale.

2. The United States will purchase all of such machine tools and machinery which can be utilized and may be required for the manufacture of rifles and machine guns.

3. The value of the machine tools and machinery is to be fixed by appraisers, one appointed by and representing the United States, the other appointed by and representing the trustees for the Russian Government. The basis of the appraisal shall be the market value as of to-day, where such is ascertainable, and if not so ascertainable, the cost price of such machine tools or machinery plus the average increase or decrease in value of machine tools of generally similar character, the market value of which can be ascertained. From such market value shall be deducted depreciation in accordance with the percentages indicated on pages 78 and 79, under the heading "Schedule M" of the supplemental agreement between the Russian Government and the Remington Arms Union Metallic Cartridge Co., Inc., dated September 10, 1917. A copy of said schedule is hereto attached.

4. In case only a part of any machine tools can be utilized for the manufacture of rifles and machine guns, and the value of such part, as fixed by the appraisers, is less than 80% of the value of the complete machine tool, the trustees may elect to retain such machine tool and dispose of it elsewhere, as they deem fit.

5. Delivery at the plant of the Remington Arms Union Metallic Cartridge Company, Bridgeport, Conn., of the machine tools and machinery will be made immediately upon the completion of the appraisal thereof.

6. Any communication in connection with this procurement order should make reference to P2822-1494A. You are requested to notify this office of your acceptance of the enclosed copy. This order and your acceptance thereof indicated as above will constitute a verbally and binding contract on both parties.

Respectfully,

(Signed)

SAMUEL McROBERTS,  
*Colonel, Ordnance, N. A.*

25. The machine appraisal having been completed about August 13, 1918, a formal contract was prepared. It is dated October 7, 1918, and is signed by the Russian Remington rifle contract trustees and by the Remington Co., and in behalf of the United States by Col. Charles N. Black. It is numbered War-Ord-P2822-1344A instead of War-Ord-P2822-1494A, the procurement order number. After a recital of the course of title of the machinery and the agreement of January 2, 1918 (Exhibit 6), and of the option of the United States to purchase and its election to purchase, the agreement reads:

"The trustees \* \* \* do hereby sell, assign, transfer, and convey unto the United States of America all the machines, machine tools, appliances, etc., \* \* \* described in Schedule A \* \* \* located at the Remington Company plant at Bridgeport, Conn."

also—

“The United States covenants and agrees to pay to said trustees the value thereof as ascertained and fixed by said appraisers and shown in Schedule A \* \* \* the total amount payable hereunder, however, not to exceed the sum of \$3,047,473.35.”

26. In order to pay this amount to the Russian Remington trustees the Government officers in the finance section, at the request of Maj. Shepherd under date of August 1, 1918, revoked from the allotments under the three procurement orders to the Remington Co. under date of March 2, 1918, the sum of \$2,380,667.78 and reallocated that amount to the Russian Remington trustees. On November 20, 1918, another revocation of allotments to the Remington Co. under the three procurement orders was made amounting to \$666,805.57 and that sum was reallocated to the Russian Remington trustees. The total of these two amounts is \$3,047,473.35, the amount due the Russian Remington trustees under the contract of October 7, 1918. It does not appear that these revocations were intended to be anything more than a temporary departmental expedient arranged for the purpose of making funds available for the payment of fixed obligations to the Russian Remington trustees. There was no little confusion at this time in many matters, including the proper designation of the trustees and their relations to Russia and the Remington Co.

27. The revocations of allotments left the Remington Co. with obligations for facilities amounting to \$6,041,529.12, while the funds under the diminished allotments amounted to only \$3,238,284.64. This leaves an excess of expenditures and obligations made by the Remington Co. over the available allotments to it of \$2,803,244.17.

28. Printed drafts of proposed facilities contracts for the three arms were sent to the Remington Co. in May, 1913, but they were not satisfactory. Negotiations continued from time to time as to the terms of the contracts until November 27, 1918, when final printed copies were sent to the claimant. There were three of these printed contracts, one for each arm. They were executed by the Remington Co. on December 16, 1918, and were sent to the Chief of Ordnance with three letters, all substantially alike but referring separately to the three contracts and stating that the contracts are returned with proper signatures with the understanding that the amount stated in the contract “does not cover the whole of such increased facilities, etc., required for the purposes for which these facilities are provided. and with the further understanding that in accordance with verbal and written instructions from the Ordnance Department and with its full knowledge and approval as indicated in correspondence pertaining thereto, we have proceeded with the preparation of and commitments for all, or substantially all, of the facilities required and that the additional amounts necessary to pay for all of the facilities



required for the purposes as defined in the contract will be provided for by the United States in proper amendments to this contract." (Exhibits 76, 77, and 78.) The three contracts are dated March 22, 1918.

29. The printed contracts in respect to increased facilities for the manufacture of heavy Brownings is in substance as follows:

It recites that a state of war exists between the United States of America and certain foreign countries, constituting a national menace, wherefore the usual requirements for advertisement for proposals are dispensed with; that the United States urgently requires the performance of the work hereinafter described, and it is necessary that this work be completed within the shortest possible time; that it is desired to make provision for the installation of increased facilities for the manufacture of heavy Brownings and that the contractor has an organization capable of performing such work and is ready to undertake the same upon the terms and conditions herein provided.

Article I reads:

*"Increased facilities.*—The contractor agrees to make the necessary rearrangement of its plant at Bridgeport, Connecticut, and to partly make and install and partly purchase and install such machine tool and other equipment (hereinafter called increased facilities) as in addition to the present facilities of the contractor shall be necessary to enable the contractor to manufacture three hundred fifty (350) caliber .30 (heavy type) machine guns, model of 1917, per day, commencing December 1, 1918. The procurement and installation of such increased facilities shall be in accordance with schedules submitted to and approved by the Ordnance Department, and such changes as may be made therein as hereinafter provided. It is estimated that the cost of such increased facilities and the installation thereof, together with the cost of rearrangement of present facilities, will amount to approximately two million six hundred seven thousand six hundred fifty-seven dollars (\$2,607,657). The cost thereof will be paid by the United States, as hereinafter provided, but such estimate is not to be exceeded unless additional cost is specifically authorized in writing by the Chief of Ordnance. The approval of the Chief of Ordnance of the purchase of specific items included in the schedules shall be obtained as such items are purchased or contracted for. Approval by the Chief of Ordnance of any increased facilities other than those mentioned in the schedules and the source of supply and the prices to be paid therefor shall be a prerequisite to any obligation on the part of the United States to pay for expenditures made or obligations incurred subsequent to the signing of this contract on account of such increased facilities.

"The machinery, tools, and other increased facilities paid for by the United States shall immediately upon such payment become the property of the United States and shall, in so far as practicable, be kept separate and apart from the property of the contractor and shall be marked as the Chief of Ordnance may direct."

\* \* \* \* \*



Article II reads:

*Payments.*—The United States will make the following payments for the increased facilities:

“Upon the certificate of the Chief of Ordnance showing approval of material delivered and services or labor performed in connection with the increased facilities and work properly incident thereto as herein elsewhere provided the United States will forthwith pay all proper items of cost.

“The determination of the actual cost for which the United States will pay shall be made in accordance with the pamphlet entitled ‘Definition of “Cost” pertaining to Contracts’ issued by the finance section, Ordnance Department, United States Army, dated June 27, 1917, and made a part hereof by reference.

“For any machinery, fixtures, gauges, and other necessary equipment made wholly or in part by the contractor and for all work done by the contractor on the installation of the increased facilities and on the rearrangement of its present facilities and for the cost of labor, material, and overhead for all such manufacture and other work above specified the contractor shall be paid in addition to the actual cost as above a profit of 10% on the cost of such machinery, fixtures, gauges, and other equipment, or when same are only partly manufactured by the contractor it is to receive 10% on the cost of the portion manufactured by it periodically as accounts can be audited, but not less frequently than monthly. No profit shall be allowed to the contractor upon the procurement of increased facilities from firms or corporations other than the contractor.”

30. The contracts for facilities for the “pistols” and “Pedersen devices” are identical with the “Contract for heavy Brownings,” except as to the amount to be paid.

31. One of the issues before the Board is as to the effect of a formal contract executed after the armistice and after the performance by the contractor of his informal agreement.

32. The United States had removed from the Remington Co.’s plant at Bridgeport since January 19 2,662 machine tools, which were facilities which had been used in the manufacture of the three arms. Of this number, 2,167 were purchased from the Russian trustees and 495 were purchased from outside contractors. In addition to the machine tools 98 per cent of the special equipment, comprising jigs, fixtures, gauges, cutters, drills, reamers, arbors, etc., which had been provided by the Remington Co. as facilities for the manufacture of the Browning machine guns, and 95 per cent of the same kind of equipment which had been provided by the Remington Co. for the manufacture of the Colt pistol have been removed by the United States. The shipment of these machine tools and of the special equipment has been made to the arsenals of the United States or to Government warehouses. The remainder of the special equipment for the Browning machine guns and the Colt pistols has been packed ready for shipment. The equipment for the manufacture

of the Pedersen device has been left at Bridgeport, for the reason that it is possible that a new contract may be made with the Remington Co. for the manufacture of this device.

33. There has been no suggestion in the record or in the evidence that the Remington Co. did not perform its undertakings to the satisfaction of the Ordnance Department. No less than 28 contracts were in existence in November, 1918, between the claimant and the United States, all of which called for adjustment.

#### DECISION.

1. We have touched in the findings of fact on a few of the salients in this case. Enough has been stated to demonstrate that there was no conflict in intention between the officers of the Ordnance Department and the representatives of the Remington Co. The United States intended to pay for the necessary facilities for the manufacture of the three arms, and having paid for them to become their owner. The difficulties that have arisen are due to the unavoidable confusion that ensued from the attempt of all concerned to perform unprecedented undertakings within a period of time all too brief. The work was well done, both by the officers of the Ordnance Department and by the Remington Co. It remains for the United States to perform its obligations.

2. The Remington Co. began work on the Browning machine guns on August 4, 1917, and on September 24, 1917, it received a purchase order for 15,000 machine guns which stated that "the contract to be entered into shall contain such other and usual terms and conditions as may be required by the Ordnance Department," and a form for "Cost and profit contract" was inclosed with the purchase order.

The purchase order recited that it was "in confirmation letter of this office of August 4, 1917 (C. M. C. 472.543/3)."

3. We determine that an agreement was entered into between the United States and the Remington Co. on August 4, 1917, confirmed by purchase order of September 24, 1917, for the manufacture of Browning machine guns; that the officer representing the United States was Gen. William Crozier, Chief of Ordnance; that the terms of the agreement were that the manufacture of the guns should be on a cost plus 10 per cent basis; that all additional facilities that were necessary for the production of the Browning machine gun should be acquired by the Remington Co.; that the United States should repay to the Remington Co. the cost of such facilities as it should purchase; that for all facilities that the Remington Co. should manufacture in its own plant the United States should pay the Remington Co. the cost plus 10 per cent; that the United States should own all

the facilities that it paid for, whether purchased from outside contractors or manufactured inside the Remington Co.'s plant.

4. These were the terms of the agreement under which the Remington Co. undertook the manufacture of Browning machine guns. The testimony of the officers of the Ordnance Department and of the witnesses for the claimant is to that effect. There is no conflict in the evidence. It is not the inference that is made from the statements of one or two of the witnesses. All are unanimous that the agreement with the Remington Co. was as stated. These were "the usual terms" prescribed by the Ordnance Department, using the words of the purchase order of September 24, 1917. They were in substance the terms under which many other "facilities" contracts with other concerns were performed.

The terms were substantially those contained in the first drafts of contracts that were sent the Remington Co. in May, 1918, and those found in the formal contracts executed by the Remington Co. on December 16, 1918.

5. The requirements for the production of Browning machine guns as to the number of guns to be manufactured and as to the time in which they were to be delivered were unprecedented.

It was a new weapon. The details that had to be worked out before actual production could be begun were incredibly complicated and were subject to frequent and continuous changes that extended through the summer of 1918.

6. The decision of the Ordnance Department that the Remington Co. should undertake the manufacture of Colt pistols was made in December, 1917, after investigation, and after conferences with the Remington Co.'s representatives.

The Remington Co.'s officers stated that the same arrangements would have to be made for the payment for increased facilities for the manufacture of Colt pistols that had been made for the manufacture of Browning machine guns.

That was agreed to by the officers of the Ordnance Department.

7. The order to the Remington Co. to proceed with preparations to manufacture Colt pistols came in the letter of December 29, 1917, from Gen. Wheeler, Acting Chief of Ordnance, which was initialed by Gen. Thompson, chief of the small-arms section.

It called for the manufacture of 150,000 Colt pistols and stated that the contract would contain "such other and usual terms as the Ordnance Department may prescribe."

The terms that were orally agreed to as to facilities were that the United States should pay for all such additional facilities as should be necessary for the manufacture of Colt pistols and that the other terms should be the same as those under which the Remington Co. had undertaken the manufacture of Browning machine guns.

8. The manufacture of Colt pistols in the volume required by the orders of the Ordnance Department made the undertaking of the Remington Co. a colossal one.

No other concern would have ventured on so mighty a task.

The drawings which had been used by the Colt Co. were of little value. The requirements for interchangeability of parts, coupled with the production of 3,000 pistols a day, called for an entirely new set of drawings.

These were made by the Remington Co. and were used by the other pistol manufacturers in place of the Colt Co. blue prints.

The Colt Co. had been able to make a few pistols a day whose parts were interchangeable, but this was due to the skill and experience of some of its workmen and was accomplished in spite of defective and insufficient plans or drawings.

The magnitude and difficulty of the Remington Co.'s pistol manufacturing contract can hardly be overstated.

It is agreed that the claimant's performance of the Colt pistol contract was most creditable to it and that was an important reason for the letter of September 4, 1918, which, while it reduced the per diem requirement of Browning machine guns from 500 to 350, stated that the Remington Co. may use any machines released by such reduction in the manufacture of Colt pistols.

9. A letter of January 23, 1918, signed by Gen. Wheeler, Acting Chief of Ordnance, and approved by the Secretary of War, constitutes the agreement as to facilities under which the manufacture of the Pedersen device went forward. That letter provides that—

“\* \* \* the Government (is) to pay all expenses for the necessary additional machinery, special equipment, and special machinery that may have to be acquired, and all other costs of manufacture, all machinery and equipment provided or paid for by the Government to become the property of the Government.”

It was understood and agreed between the Remington Co. and the Government that the usual provisions of Ordnance Department contracts for facilities should obtain in respect to the procurement of facilities for the manufacture of the Pedersen device, viz, that for such facilities as the Remington Co. purchased from contractors outside of its own plant the Government would pay the cost and no more, while the Government would pay for the work done by the Remington Co. in its own plant in the manufacture of facilities the cost of such manufacture plus 10 per cent.

The Pedersen device was a new invention and had not been manufactured by anybody prior to February, 1918. It was not possible for any expert to determine with any approach to accuracy what machinery, machines, machine tools, jigs, gauges, etc., would be required for the manufacture of 1,000 Pedersen devices per day.

The situation on February 1, 1918, was that oral agreements had been entered into between the United States and the Remington Co. in respect to furnishing the facilities for the manufacture of the Browning machine gun and the Colt pistol as stated, and that there was an agreement between the United States and the Remington Co. as to facilities for the Pedersen device which was based on the letter of January 23, 1918. The agreements in respect to the three arms were identical.

The touchstone to be applied to the agreements for facilities is the word "necessary." It is the word used by all the witnesses in describing the arrangements between the United States and the Remington Co. when they say that the Government was to pay for all such additional facilities as are necessary. The same word is used in the drafts of contracts, in the formal contracts, in the letter of January 23, 1918, and elsewhere. The pressure on the Government to supply its Army with machine guns and pistols was enormous and unremitting. A similar pressure was applied by the officers of the Ordnance Department on the Remington Co. The limit on the facilities which were to be provided for the manufacture of the three arms was always and only such facilities as were necessary to meet the gigantic requirements of the department. The details of the kind and amount of machines, jigs, gauges, etc., that should be provided for the manufacture of the three arms were left to the Remington Co. to determine, but no purchase of any facility was made by the Remington Co. for which claim is now made against the United States which does not carry with it the approval of an officer of the United States. The attitude of the Ordnance Department is shown in the letter of Col. McFarland to the Remington Co., dated November 3, 1917:

"(d) This department does not feel in a position to prescribe the manufacturing methods which any particular manufacturer should follow in planning and constructing equipment or in the actual manufacture of the gun, as it is thought that such manufacturer should determine the particular plan which best suits his organization and facilities, having in view the delivery of guns at the earliest practicable date, with final delivery of the required number within the time specified."

We have found that on February 1, 1918, the Remington Co. was engaged in the manufacture of the three arms; that the terms under which the facilities were to be furnished had been settled, and that informal agreements were in existence under which the work was going on.

We come now to a discussion of the estimates that were furnished by the Remington Co. and the three procurement orders of March 22, 1918.



10. The Remington Co. contemplated when it submitted its estimates of February 20, 1918, that the Government would make use of the Russian machinery and equipment. On the same day, to wit, February 20, 1918, the Government issued a purchase order to the Russian trustees by which the Government exercised its option on the Russian machinery and determined to purchase that machinery direct from the Russian trustees and not through the Remington Co. This procurement order is signed by Gen. McRoberts himself, who was the head of the Procurement Division. This is important, since before the estimates contained in the Remington Co.'s letter of February 20, 1918, were received by the Ordnance Department it had already been determined that the purchase of the Russian machinery should be made under a separate procurement order and a separate contract with the Russian trustees and not through the Remington Co.

Before any action was taken by the Ordnance Department in response to the claimant's letter of February 20, 1918, the estimates were revised and additional items estimated to amount to \$400,000 were added and certain machinery requirements were increased by about \$100,000. This was done by the claimant's letter of March 19, 1918.

11. What is the effect of the three procurement orders of March 22, 1918? They were accepted by the Remington Co., but with certain qualifications or reservations in respect to the Colt pistol and the Pedersen device.

One suggestion is that when the Remington Co. made its estimate of February 20, 1918, it made an offer or bid or proposal by which it undertook to supply all the facilities that were necessary for the manufacture of the three arms in accordance with the requirements at a cost of not to exceed the costs stated in its estimates.

That suggestion is not borne out by the evidence. It is in fact inconsistent with the testimony of the officers of the Ordnance Department as well as that of the claimant's witnesses. Many of the officers of the Ordnance Department who testified before us stated explicitly that no such arrangement was intended or contemplated. No officer of the Ordnance Department has testified that such an arrangement was made. There are also several considerations which are conclusive against the existence of such an arrangement.

(a) The total of the sums mentioned in the three procurement orders of March 22, 1918, is \$6,285,758. The estimates made by the Remington Co. in its two letters of February 20 and March 19, 1918, are \$6,285,758, plus \$400,000 and plus about \$100,000 more.

(b) It was not possible to make estimates in February, 1918, that would be anything except a guess. The claimant had not proceeded



far enough in production on February 20, 1918, to determine how much additional equipment would be required.

(c) In the letter of February 21, 1918, from the Procurement Division to the claimant it is stated—

“\* \* \* It being impracticable at this time to determine the unit prices upon which to base said contracts, nor to estimate with any degree of accuracy the amount of money required to be expended in the purchase of machinery and other equipment, and in the required rearrangement of existing manufacturing facilities.”

This statement over the signature of Col. Black is supported by the testimony of all the claimant's witnesses and most of the officers of the Ordnance Department.

(d) In the letter from the Remington Co. to the Ordnance Department of February 27, 1918, the claimant says:

“We are submitting the attached estimates with the understanding that the items may be modified as and when necessary to economical production and at an increased or decreased cost as may eventuate.”

In its letter of February 20, 1918, the claimant writes:

“We have also prepared more comprehensive estimates of the costs involved, although these estimates will still be subject to modifications as conditions of the labor, machinery, and supply markets make them necessary.”

(e) A large portion of the machines scheduled and included in the estimates belonged to the Russian trustees and the value of these machines was a separate matter to be determined by an appraisal carried on by appraisers appointed by the United States and by the trustees, and payment for these machines was to be made directly by the United States to the trustees and not to the Remington Co. The claimant therefore had no control over the amount to be paid by the United States to the Russian trustees. It was natural to include the Russian machinery in the estimate of what it would cost the United States to furnish the necessary facilities, but it is inconsistent with a bid by the Remington Co. to furnish facilities for a limited amount if the United States was to buy a very large portion of the facilities itself from other persons.

(f) The estimates made by the Remington Co. contemplated that a considerable portion of the cost of that portion of the facilities that should be made inside the Remington Co.'s plant should be paid for in connection with the production contracts for the three arms and not as a part of the facilities contracts. It was not until May or June, 1918, that the United States determined to include this class of facilities as a part of the facilities contracts, and at that time the cost of facilities made inside the Remington plant was changed from the production contracts to the facilities contracts account.

(g) An agreement by the Remington Co. to supply all necessary facilities for a limited sum was contrary to the previous oral agreement that had been entered into and contrary to the terms of the agreement that was made by letter of January 23, 1918.

(h) It was known both to the officers of the Ordnance Department and to the Remington Co. that the requirements for the production of the three arms was so immense and the time in which to manufacture them was so short that it was completely impossible for any contract to be entered into for a fixed amount which would be even approximately accurate.

(i) The requirements as to interchangeability of parts of the machine guns and the Colt pistols were that not only should all the parts made by the Remington Co. for each weapon be interchangeable with the same parts that were made for all other similar weapons manufactured by it, but also that all the parts for these two arms made by the Remington Co. should be interchangeable with similar parts made by all other concerns engaged in the manufacture of these two arms. This was a rigorous requirement and required a perfection in manufacture that had not been originally contemplated by the Remington Co.

(j) "Mass production" of the three arms had never been undertaken by any company before. The time allowed the Remington Co. for reaching an extraordinary per diem production was extremely limited. Col. Eames testified, after stating that he understood the estimates might be increased or diminished, as follows:

"It should be borne in mind that in an ordinary time of peace a period of 18 months to put in the installation for getting out 500 pistols a day is appalling, and we demanded that they put in an installation sufficient to get out 3,000 pistols a day and finish it in 5 months. They began about the end of that period. I simply mention that to indicate why these things were done in such an apparently reckless manner. There was no other way to do it."

We determine that the three procurement orders of March 22, 1918, constitute parts of the informal agreements under which the manufacture of the three arms continued to go forward.

They do not supersede the oral agreements. No reference is found in the orders to the important provisions of the previous agreements that the Remington Co. should receive no profit on the purchases of facilities made by it on the outside and that it should be entitled to 10 per cent profit on the facilities made by it in its own plant.

The main purpose of the procurement orders was as a basis for the allotment of funds out of which to pay for the facilities.

The procurement orders did not eliminate the essential word on which all the arrangements with the Remington Co. depended.

The procurement orders were still subject to the provisions of the agreements that the United States would pay the Remington Co. for such additional facilities as were "necessary."

The effect of the procurement orders is that the money limits therein stated are not to be exceeded unless it is found that additional facilities are "necessary" to enable the Remington Co. to reach the requirements for production of the three arms, both as to the totals named and as to the number to be produced daily.

It was understood by all concerned that in case the amounts stated in the procurement orders should not prove sufficient to cover all necessary facilities, additional procurement orders would be issued and additional funds allotted. This method was followed by the Ordnance Department in other cases. It was an established practice which the emergency of the war made necessary.

The Remington Co. is not asking for any reimbursement for any facilities beyond those that have been found to be "necessary" to accomplish its task and the determination as to necessity is not that of the Remington Co. alone, but it is also that of the officers of the Ordnance Department who were charged with the duty of making such determination.

An officer of the Ordnance Department was stationed at the claimant's plant at Bridgeport who approved in writing the purchase of all facilities as to which the Remington Co. now makes claim for reimbursement.

The costs of the facilities manufactured by the claimant inside its own plant have been certified and approved by Government accountants for the most part, although some additional work remains to be done by them.

If the procurement orders as to the Browning machine gun had constituted a contract under which the Remington Co. agreed to furnish all the necessary facilities for the sum named in the orders (which is not the case), that contract would have been entirely upset by the issuing of three new procurement orders after March 22, 1918, calling for such an additional number of field and base spare parts of the gun beyond anything that had been contemplated in February and March, 1918, that the requirements for Browning machine guns rose from 500 per day to nearly 1,000 per day. The Remington Co. was required to manufacture enough field and base spare parts beyond those on which the estimates and procurement orders were based to make one more gun in addition to each of the 500 per diem requirement. The facilities had nearly all been purchased or contracted for by September, 1918, when the per diem requirements were reduced to 350. As all the extra spare parts had to be manufactured within the same time as the guns themselves and be shipped

along with the guns the facilities that were needed for these increased requirements were commensurably increased.

A production of 350 Browning machine guns per diem with the added spare parts required substantially more facilities than the earlier requirement of 500 machine guns with standard spare parts only.

Besides this the Government ordered a rear sight and a complicated panoramic sight for the Browning machine gun that greatly increased the number of operations necessary to complete a gun and added measurably to the increased facilities required.

Changes in the Browning machine gun were constantly and frequently being made after March, 1918, all of which affected the number and kind of necessary facilities.

If then the Remington Co. had made a proposal to furnish all the facilities for the Browning machine gun as that gun was designed in March, 1918, and agreed to do so for a limited amount of money, such an agreement soon disappeared beyond resurrection when requirements were nearly doubled and substantial changes and additions to the guns were made by direction of the Ordnance Department.

However, that was not the agreement, and no witness on either side has so testified.

The estimated number of Russian machines that would be used as stated in the claimant's letter of March 19, 1918, was 4,391. The United States acquired 799 additional machines from the Russian trustees, all of which are included in the bill of sale and contract of October 7, 1918, and for which the United States has paid to the Russian trustees \$3,047,000 and owes about \$100,000 more.

The United States itself determined to buy these additional machines from the Russian trustees and by doing so added to the number which the Remington Co. had included in its estimates. The percentage of increase above shown is over 18 per cent, which would amount to about \$550,000 if applied to the \$3,140,000 which is substantially the amount to which the Russian trustees were entitled under the contract of October 7, 1918.

The United States has bought all these machines from the Russian trustees and now owns them, and has had the benefit of their use on its work by the Remington Co.

In other words, the United States by its action in acquiring 799 more machines from the Russian trustees than had been estimated, and in charging the additional cost to the Remington Co.'s allotments and procurement orders, must be held to have enlarged by such action any limit on the amount of facilities needed that had previously been fixed.

The United States paid the bill that it owed to the Russian trustees by taking the money from funds that had been allotted to the

Remington Co. There was much testimony as to the manner in which funds were allotted and allotments revoked, and as to the transfer of funds from production account to facilities account and the reverse. None of this evidence has any material bearing on the issues presented.

The rights of the claimant depend on a determination of the terms of its agreements with the United States and not on the methods adopted by the Government for the payment of its obligations.

The Remington Co. had included in its estimates of February 2, 1918, the facilities that belonged to the trustees.

The United States had an option on all the facilities belonging to the trustees. By the procurement order directed to the trustees and issued on February 20, 1918, the United States had exercised its option to purchase all the facilities that were necessary for the production of the three arms. On March 1, 1918, an appraiser had been selected by the United States to appraise these facilities. Before the procurement orders of March 22, 1918, were issued, the United States had determined to acquire title from the trustees of all necessary facilities, and the title passed from the trustees to the United States as soon as any article of machinery or machine was designated for use on the manufacture of the three arms.

The agreement between the United States and the trustees was distinct and separate from the agreement between the United States and the Remington Co. The United States dealt directly with the trustees. The payments which it made were made to the trustees. The Remington Co. was not a party to the agreements between the United States and the trustees.

The acts of the United States are consistent throughout in dealing with the trustees as one entity and with the Remington Co. as another entity.

The formal contract with the trustees dated October 7, 1918, covered a portion of the facilities the title to which had been already acquired by the United States and the payments thereunder were due to the trustees and not to the Remington Co.

The procurement orders of March 22, 1918, if treated as contracts, were with the Remington Co., not the trustees. The limitations on expenditures were limitations on the amounts to be spent by the Remington Co. for which the Remington Co. should be entitled to reimbursement.

They were not limitations on the amount that the United States should pay to the trustees in acquiring title to their facilities. That was *res inter alies*.

The proposed formal contracts which the Government prepared and sent to the Remington Co. for execution provided for the payment to the Remington Co., not to the trustees, of an amount not



to exceed \$6,285,758 "unless additional cost is authorized by the Chief of Ordnance." These drafts furnish evidence of what the Government considered to be the terms of the previous oral agreements, or rather, admissions by the Government that it was bound at least to the extent provided for in the drafts of contracts which the Government prepared and submitted to the Remington Co. Three separate drafts were prepared covering the three arms, and they were all substantially alike, except that the estimated cost for increased facilities for the machine guns was \$2,607,657, for the Colt pistol \$2,247,217, and for the 0.30/18 pistol \$1,430,684. Article I reads:

"The contractor agrees to \* \* \* purchase and install such machinery, etc., which in addition to the present facilities of the contractor shall be necessary to enable the contractor to manufacture 500 Browning machine guns \* \* \* and necessary spare parts per day beginning December 1, 1918. The procurement and installation of such machinery, etc., shall be in accordance with detailed plans submitted to and approved by the carriage section \* \* \* and such changes as may be made therein as hereinafter provided. It is estimated that the cost of such increased facilities will amount to approximately \$2,607,657, and the cost thereof will be paid by the United States as hereinafter provided, but such estimate is not to be exceeded unless additional cost is authorized by the Chief of Ordnance. The approval by the Chief of Ordnance of the purchase of specific items included in the detailed plans shall be obtained as such items are purchased or contracted for. Approval by the Chief of Ordnance of any increased facilities other than those mentioned in the detailed plans, and the source of supply and the price to be paid therefor shall be prerequisite to any obligation on the part of the United States to reimburse the contractor for expenditures made or obligations incurred subsequent to the signing of this contract on account of such increased facilities.

"The equipment, etc., paid for by the United States shall immediately upon such payment become the property of the United States and shall in so far as practicable be kept separate from the property of the contractor and shall be marked as the Chief of Ordnance may direct.

"ARTICLE II. The United States will make the following payments to the contractor for the increased facilities: Upon the certificate of the Chief of Ordnance showing approval of property delivered and service or labor performed in connection with the increased facilities the United States will promptly reimburse the contractor for all proper items of cost."

The remainder of Article II and Article III makes provision for the manner in which the cost shall be determined.

Article IV provides for the inspection, Article V for a waiver of liens, and Article VI provides that all subcontracts shall be made by the Remington Co. in its own name and "all subcontracts, purchases, estimates, and arrangement for performing this contract must



be approved by the Chief of Ordnance or his duly accredited representative." The formal contracts which were executed by the Remington Co. on December 16, 1918, make provision in Article I for increased facilities in language almost exactly identical with the provisions of the drafts which have been quoted. There are one or two verbal changes, but the only one of importance is that in place of the words "detailed plans," which are used in the drafts, the word "schedules" is used in the formal contracts. The provision in the drafts that the facilities paid for by the United States should become the property of the United States is the same in the two instruments. The provision in Article II of the drafts and of the formal contracts in relation to cost is the same. The formal contracts provide, as the drafts do not, that the contractor shall be paid a profit of 10 per cent on the cost of such machinery, etc., as was made in whole or in part by the contractor, and also that no profit should be paid the contractor upon the procurement of increased facilities from other firms and corporations. The formal contracts also contain provisions for the cancellation and termination of the contract. The provision in Article X of the formal contracts is like that contained in the drafts, but with this additional provision, that the contractor shall not be entitled to reimbursement from the United States for expenditures under subcontracts until such subcontract "shall have been submitted to and approved by the contracting officer, except that in case no action is taken by the contracting officer within seven days after such submission, his approval of the contract or subcontract so submitted shall be presumed."

Article XIV of the formal contracts provides for the adjustment of "all claims, doubts, or disputes by the Secretary of War or by a board selected by the Secretary of War to hear and determine any such claims, doubts, or disputes \* \* \*."

Article XVIII defines the Chief of Ordnance as including the Acting Chief of Ordnance or "any person who is accredited as his duly authorized representative specifically delegated to perform such functions as are herein attributed to the Chief of Ordnance."

The provision in the draft is that the term "Chief of Ordnance" shall be construed to mean his "successor or successors, his duly authorized agent or agents."

Another difference between the drafts and the formal contracts is that the drafts provide for the manufacture of necessary spare parts, whereas in the formal contracts the provision for spare parts is omitted.

The important differences therefore between the proposed contracts and the formal contracts are that the words "detailed plans" in the draft are changed to "schedules" in the formal contracts, and

that the provision for manufacturing the necessary spare parts is not contained in the formal contracts.

When the drafts or galley proofs were submitted to the Remington Co. on or about May 6, 1918, the matter was referred by the Remington Co. to Capt. A. M. Mattice, its advisory engineer, who prepared a memorandum showing the changes that were desired (Exhibit 46). Marginal notes and suggestions were made on the gallery proofs. The substance of this memorandum is that the drafts do not provide for the payment to the Remington Co. of the usual profit on facilities manufactured by it in its own plant. The other matters referred to in the memorandum relate to methods of payment for the Remington Co.'s disbursements and the suggestion that the system of cost accounting then in operation be continued, a suggestion that the private affairs of the Remington Co. should be secure from inspection, a request to be exempt from giving a bond, a change in the wording of that the "Chief of Ordnance" means, and a suggestion that purchases for less than \$5,000 might be exempted from detailed approval by the officer of the Ordnance Department. The closing paragraphs of the memorandum are as follows:

"On the same page we have crossed out the words 'and necessary spare parts.' The equipment included in the estimates which we have submitted was sufficient only for 3,000 pistols per day, and any spare parts which may be required would have to come out of the pistol production. It would evidently not be possible to estimate on equipment to include spare parts unless we know beforehand what quantities of spare parts would be required.

"On the same page we have changed 'detailed plans' to 'schedules' in three places. This is one of the most important of all the changes. If detailed plans must be prepared before the items involved can be purchased or contracted for, it would be absolutely impossible to meet the production dates which the Government desires, or anything even approximating such dates. The words 'detailed plans' would result only in delays, with no offsetting advantage."

The reason for the delay in settling on the terms of the formal contracts does not clearly appear. There were numerous discussions between the officers of the Remington Co. and the officers of the United States. The undisputed evidence of the witnesses both for the Government and for the claimant shows that the understanding between the parties from the beginning was that the Remington Co. should act as intermediary between the United States and outside contractors in the purchase of the needed facilities, and that the Remington Co. should pay the outside contractors for all outside purchases, and that the United States should reimburse the Remington Co. for all such payments, but that no profit or commission or fee to the Remington Co. should be added. It was also the understanding between the parties from the beginning that for facilities

manufactured and work done by the Remington Co. in its own plant the Remington Co. should receive the cost thereof plus a profit of 10 per cent.

The point made by Capt. Mattice in respect to "detailed plans" was well taken. There never were any detailed plans and there is no evidence to show that there was any objection to making the change from "detailed plans" to "schedules."

There is another memorandum made by Capt. Mattice (Exhibit 58), dated July 29, 1918, which was sent to the contract section of the Procurement Division on August 15, together with the proposed drafts. This memorandum covers many details but has to do chiefly with suggested verbal changes. The substantial matter dealt with is in relation to payment being made to the Remington Co. to cover the cost to it of the rearrangement and installation of the facilities. Payment for that cost is provided in Article I of the formal contract.

That the procurement orders of March 22, 1918, were not issued for the purpose of superseding prior agreements but were issued as one of the preliminaries to formal written contracts is demonstrated by the evidence, e. g.:

(a) The procurement orders contain a heading to the effect that the contracts covering these orders will be prepared immediately on receipt of acceptance.

(b) The drafts of contracts which the Government prepared and sent the claimant contained this provision in Article I:

"It is *estimated* that the cost of such increased facilities will amount to *approximately* \$1,430,884 (in the Pedersen device draft) and the cost thereof will be paid by the United States as hereinafter provided. Such *estimate* is not to be exceeded unless additional cost is authorized by the Chief of Ordnance."

This is not only the best evidence of what the Government understood were the terms of the agreements, but it constitutes an admission by the Government that it is bound at least to the extent covered by the provisions which it prepared and announced itself ready in May, 1918, to sign.

The provisions, of Article I of the formal contract which both parties executed are substantially identical with those received above.

The important words are "estimated" and "approximately" and the phrase that the "estimate" is not to be exceeded unless additional "cost" is authorized by the "Chief of Ordnance."

"Chief of Ordnance" is defined in the draft as meaning "his successor or successors, his duly authorized agent or agents."

(c) One example of exceeding the "estimate" and of adding to the cost is found in the action of the Ordnance Department in purchasing for the Government 799 more machines from the Russian

trustees than were originally listed, which involved more than \$500,000 additional.

(d) Col. Bascom Little, who was special assistant to the Chief of Ordnance and whose duties and powers over small arms were plenary, testified, page 205:

"So far as I know nobody in the Ordnance Department had any idea that that estimate that they made was anything except to establish some sort of a figure to shoot at.

"Q. To work from?

"A. Yes."

(e) Col. Hayden Eames, who was in charge of the production of small arms, testified:

"The consequence was that the initial estimates of the machinery required was little better than a good general guess based on the general knowledge of the subject and nothing more; therefore necessarily subject to change as we went along, and our main object in getting any kind of complete estimate at all was the one set forth by Maj. Jeffery this morning partly, and partly as a basis for making procurement orders. There had to be something definite, with full expectation that it might be raised, lowered, or changed at any time."

(f) Maj. Jeffery, whose duties were the supervision of the facilities that were furnished for the manufacture of the three arms, testified that in his conversations with Mr. Kimball and Mr. Betts, representing the claimant company, he stated:

"We had a certain allotment on different facilities contracts, and those were based on preliminary estimates made for the purpose of having a certain amount of money set up to apply, which was a prerequisite to securing any authorization or any money; that they were furnishing information as fast as they could as to what their actual necessities were, and then we on our part were moving the paper work as rapidly as we could to bring those into the form of appropriations or allotments."

That the claimant began making applications for additional allotments in May, 1918, and that—

"It was the understanding throughout the entire department that upon a proper showing by the Remington Company this additional allotment would be granted."

He stated further that he learned that the expenditures for facilities had exceeded the original estimates in July, 1918, and—

"Then as the matter developed and it was seen that further money was needed to acquire the facilities necessary to produce the various arms that they were under contract to make they started sending in applications for small amounts for minor purchases, and we started through the applications to secure the increased allotments. That

procedure became extremely burdensome, because it meant the same amount of work for a single machine as there would be for a million-dollar appropriation, and our later efforts were to try to find out what their needs would be for, say, some months ahead, and at the time of the armistice we were engaged in working up an intelligent and more or less comprehensive estimate as to the requirements, with the idea of putting through an application for an allotment which would carry them some time.

"I said to them (the claimants) at various times that this thing was thoroughly understood by the various officers, and for them to go ahead and not stop and wait for me to get these things through; that they would go through and in due course of time the money would be appropriated, and in several cases we explained the reason for the delay of getting them through.

"I always viewed the procurement order as commonly understood as being a Government order not containing a lot of detail, but issued for the purpose of getting an allotment so that the contractor would have something that he could go ahead on."

We attach little importance to the three formal facilities contracts issued in December, 1918. Those contracts were executed after the need for the facilities therein provided for had ceased to exist. (25 Comp. Dec., Nov. 25, 1918.) Moreover, all of the facilities, or substantially all, covered by those three contracts had already been procured by claimant. The claimant's execution and delivery of those contracts was only conditional and contained reservation in the claimant's three letters of December 16, 1918, returning the contracts after they had been signed by them, in the following words:

"We are returning with proper signatures the attached original and triplicate of contract \* \* \* with the understanding that the amount of \* \* \* specified therein does not cover the whole of such increased facilities, etc., required for the purposes for which these facilities are provided, and with the further understanding that in accordance with verbal and written instructions from the Ordnance Department and with its full knowledge and approval as indicated in correspondence pertaining thereto, we have proceeded with the preparation of and commitments for all, or substantially all, of the facilities required, and that the additional amounts necessary to pay for all of the facilities required for the purposes as defined in the contract attached will be provided for by the United States in proper amendments to this contract.

"We execute and return the contract with the understanding that the second paragraph of Maj. Swartout's letter of November 27 is not meant to include mere casual or incidental requests." (Exhibits 76, 77, and 78.)

Our conclusion is that the United States entered into agreements with the Remington Co. for the manufacture of Browning machine guns, Colt pistols, and the Pedersen device; that the agreement for



the Browning machine guns was made on August 4, 1917; that the agreement for the Colt pistols was made on December 29, 1917, and that the agreement for the Pedersen devices was made on January 23, 1918. That the agreements were identical for the three arms, and provided that the United States would reimburse the Remington Co. for all facilities which it acquired which were necessary for the production of the three arms in the amount and within the time required by the Ordnance Department. That the United States should become the owner of the facilities for which it made payment. That the Remington Co. should receive for the facilities which it purchased for Government use from outside contractors the exact amount which it spent and no more, and that the Remington Co. should receive for the facilities which it manufactured in its own plant the cost of manufacture plus 10 per cent.

The agreements as above stated are the agreements under which the claimant is entitled to relief. The agreements are modified by the three procurement orders of March 22, 1918, in this respect, that the per diem requirements of the three arms are stated in the procurement orders and the money limits stated in the three orders are limits beyond which the Remington Co. was not authorized to go unless additional facilities were found necessary in order to attain the required per diem production and unless the manufacture or purchase of the additional facilities should receive the sanction of the Chief of Ordnance or "his successor or successors, his duly authorized agent or agents," and subject also to the further modifications made by increasing the requirements by orders for additional base and field spare parts and such orders and directions by officers of the Ordnance Department which increased, diminished, or modified the requirements for the production of the three arms.

The purchase by the United States of facilities from the Russian trustees is a matter between the United States and the Russian trustees, and the amounts paid or to be paid by the United States to the Russian trustees for facilities should not be deducted from the amounts stated in the three procurement orders. The limits on amounts stated in the three procurement orders are limits on the expenditures by the Remington Co. itself and should be entirely separate from payments made by the United States to the Russian trustees and from contracts made between the United States and the Russian trustees.

It appears from the evidence before us that the amounts stated in the three procurement orders of March 22, 1918, were not exceeded by the Remington Co. and that the allotments made under the three procurement orders are sufficient to reimburse the Remington Co.



for the facilities which it purchased from outside contractors as well as for the facilities which it manufactured inside its own plant.

**DISPOSITION.**

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Ordnance Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield concurring.

JUNE 19, 1920.

**Case No. 342.**

*In re* **CLAIM OF THE WAR CRETE SHIPBUILDING CO.**

1. **NO RELIEF WITHOUT CONTRACTUAL RELATION.**—The claimant is not entitled under the act of March 2, 1919, to reimbursement for loss sustained in the performance of a contract to which the United States Government was not a party.
2. **CLAIM AND DECISION.**—This claim for \$104,063.48 arises under the act of March 2, 1919, and is presented upon the theory that claimant sustained a loss preparing to perform an informal contract with the Government. Held, claimant is not entitled to relief.

Mr. Eaton writing the opinion of the Board.

**FINDINGS OF FACT.**

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$104,063.48, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The West Coast Shipbuilding Co. entered into formal contracts with the United States, dated June 29, 1918, providing for the construction of 14 concrete river boats at \$132,577 each. Seven were to be built on Puget Sound and seven on the Atlantic Coast.

3. The organizers and officers of the West Coast Shipbuilding Co. were H. W. Spear, Sydney G. Rosenberg, and E. W. Darling. The West Coast Shipbuilding Co., in August, 1918, was not making rapid progress on its contracts. It was in need of money and had not been able to secure the required bond. Mr. Darling held the title of eastern manager of the West Coast Shipbuilding Co. He and Mr. Rosenberg believed that they could obtain financial backing from individuals in the east or near east.

4. An instrument was executed in the following form:

“ AUG. 20, 1918.

“ E. W. DARLING OR E. W. DARLING AND ASSOCIATES,  
“ *Washington, D. C.*

“ Reg. seven concrete river steamers for which we have contract with war transportation service, U. S. A., to be built at Wilmington, N. C.

“ We are desirous of securing your cooperation in the handling and financing of said work and enter into the following arrangement

with you for carrying out the project on practically the same lines as discussed by us from time to time.

"In consideration of your services in performing this function and securing required financial cooperation we hereby agree to pay your salary and expenses from July 1st, 1918, until work is completed and in addition thereto \$30,000. We also agree to divide equally with you all net profits.

"All payments received on this contract shall be placed in a Washington bank, subject to the signature of either you or S. G. Rosenberg and the counter-signature of some person or persons to be appointed by us.

"We reserve the right to inspect or audit the book or accounts covering this work at any time during the life of this agreement and have full supervision of the work at all times.

"WEST COAST SHIPBUILDING COMPANY.  
H. B. SPEAR, *President*."

"Per (Signed)

5. Certain business men of Chicago, represented by their attorney, Walter H. Eckert, agreed to aid in the enterprise of constructing the seven steamers on the Atlantic coast. After conference with the officers of the Transportation Service in Washington a corporation was organized under the laws of Delaware, called the War Crete Shipbuilding Co. Its officers were E. W. Darling, president; Sydney G. Rosenberg, secretary; and W. H. Eckert, assistant secretary.

6. The Chicago men advanced some money and a yard was secured at Wilmington, N. C., materials were ordered, work was begun on the steamers, and a Government inspector assigned for service at Wilmington.

7. Messrs. Darling and Rosenberg assigned to the claimant company the rights they had acquired under the quoted instrument of August 20, 1918. The assignment reads:

"Know all men by these presents, That we, E. W. Darling and Sidney G. Rosenberg, who have heretofore done business as E. W. Darling & Associates, for and in consideration of the sum of one dollar (\$1.00) and other good and valuable considerations to us in hand paid, the receipt of which are hereby acknowledged, do hereby sell, assign, transfer, set over, and deliver to the War Crete Shipbuilding Co. all of our right, title, and interest of every kind and character which we may have in and to a certain contract with the West Coast Ship Building Company, dated August 20, 1918, and hereto attached. as well as all of our right, title, and interest in and to all proceeds derived therefrom, with full right of said corporation to take any and all such action or actions under said contract that may be necessary and to do every act or thing that we personally could do.

"In witness whereof, we have hereunto set our hands and seals this 10th day of September, A. D. 1918.

"(Signed) E. W. DARLING. [SEAL.]  
"(Signed) SYDNEY G. ROSENBERG. [SEAL.]"

8. In early October Mr. Eckert was convinced that the West Coast Shipbuilding Co. was not going to be able to furnish a bond or to perform its contracts with the United States.

He came to Washington and talked with Maj. Frank Van Vleck. He testified that he stated that the claimant company would have to stop work at Wilmington in view of the situation in which the West Coast Shipbuilding Co. and the claimant were placed, and that Maj. Van Vleck told him that under no circumstances should construction of the vessels be suspended, and that in any event the Government would see that the claimant company would be recompensed for the amount it had expended and should expend. The claimant company, relying on the assurance of Maj. Van Vleck, continued its operations at Wilmington.

Mr. Eckert's testimony is supported by the statements of some of the Government officers.

Maj. Van Vleck denies that he gave Mr. Eckert any assurances that the Government would pay the claimant for its past or future costs. His testimony is supported by that of other Government officers.

The situation in October, 1918, was one of confusion. The representatives of the West Coast Shipbuilding Co. and of the War Crete Co. and the officers of the United States have been heard several times. Varying opinions have been rendered by officers of the United States. The record is a long one and not free from difficulties and complications. The United States inspector was recalled from Wilmington the last of October and further operations at that place were discontinued.

#### DECISION.

1. The claim is that Maj. Van Vleck ordered the claimant to go ahead with its construction of the steamers at Wilmington and assured it that the Government would see that it was recompensed for its expenditures. It is contended that as a result an informal agreement was entered into between the United States and the War Crete Shipbuilding Co. within the terms of the act of March 2, 1919, under which relief should be given.

2. Such a claim is not well founded. The contracts between the United States and the West Coast Shipbuilding Co. were formal contracts, duly executed in the manner prescribed by law. The inartistic instrument by which the claimant company took the place of the West Coast Shipbuilding Co. in the construction of the seven steamers on the Atlantic coast could not operate to modify the formal contracts of June 29, 1918. The claimant company was engaged in the performance of the West Coast Shipbuilding Co.'s contracts. There was no substitution of the War Crete Co. as a concern hav-

ing contractual relations with the United States. Whether the claimant company is properly described as a subcontractor or a partner or an agent of the West Coast Shipbuilding Co. it is not necessary for this Board to determine. There is no escape from the conclusion that the War Crete Co. was endeavoring to perform the contract that had been entered into between the United States and the West Coast Shipbuilding Co. for the construction of seven concrete river steamers at \$132,577 each. It appears to be conceded by the claimant that such was the situation from the time of the organization of the War Crete Co. down to October 1, 1918, and the interview with Maj. Van Vleck.

3. In the matter of the claim of the West Coast Shipbuilding Co. numbered 150-C-2296 on our docket we have held that the determination of the validity of the contracts dated June 29, 1918, depends upon the decision of the question as to whether or not the requirement for a contractor's bond was waived, and that that question must be determined by the courts and not by this Board.

4. The War Crete Co. is in the same position that the West Coast Co. would have been in if the latter company had been engaged at Wilmington, N. C., in the construction of the seven steamers under its formal contract. There were no other contracts except those of June 29, 1918.

If Maj. Van Vleck had said to an official of the West Coast Co. on October 1, 1918, to go ahead, the Government will recompense you for your expenditures, it would hardly be contended that such statements would abrogate the terms of the formal contract and result in a new agreement having been entered into. The fact that Maj. Van Vleck may have made these statements to a representative of the War Crete Co. (although we do not intimate that he really did make such statements) can not transform the War Crete Co. from an agent of the West Coast Co. into a contractor with the United States.

5. The War Crete Co.'s undertaking was to build seven river steamers for \$132,577 each, in accordance with the terms and specifications of the contract of June 29, 1918. It was organized for the purpose of performing that contract. It had partly completed its performance. The contracts of June 29, 1918, were not canceled until October 31, 1918. The obstacles in the way of holding that Maj. Van Vleck, in his conversations with Mr. Eckert, put an end to the June 29 contract and substituted a new informal agreement with a different party, are insuperable.

There is no suggestion of any change having been made in the arrangements between the West Coast Co. and the War Crete Co.

After October 1, 1918, as well as before, the War Crete Co. was bound by its agreements with the West Coast Co.

6. The rights of the claimant company must be worked out through the West Coast Co. If assurances were given by Gen. Goethals and Maj. Van Vleck to the claimant as alleged, they are perhaps of importance as evidence that the requirement of a bond from the contractor, the West Coast Co., was waived.

If the West Coast Co. in an action against the United States is successful in establishing that the necessity for a bond was waived, it may well be that one of the elements in its damages would be the amount of expenditures made by the claimant company in the course of its performance of the undertakings of the West Coast Shipbuilding Co.

7. The testimony and the exhibits and the whole record have been examined. It would serve no useful purpose to discuss them in detail.

As has been said, the facts do not warrant a finding that there was any agreement entered into between the claimant company and the United States.

#### DISPOSITION.

A final order will be entered denying the claimant company relief.  
Col. Delafield concurring.



JUNE 19, 1920.

Case No. 1553.

*In re* CLAIM OF REMINGTON ARMS U. M. C. CO.

1. **SPECIAL FACILITIES—MACHINE GUNS AND PISTOLS.**—Where the claimant procured a lot of equipment for machine guns and pistols to use on a contract with France, which was canceled and the machinery left on its hands, and the United States desiring to control and own all available facilities for such manufacture, agreed to buy and pay for all such necessary facilities, and the correspondence and evidence shows that both parties had this particular "French machinery" in mind, that it was appraised by Government officials and used for production without charge for hire, an agreement arose under the act of March 2, 1919, to pay for such special machinery.
2. **SPECIAL FACILITIES—GUNSTOCKS.**—Where the claimant offered to make gunstocks on a cost-plus basis on condition that the Government would pay the cost of all equipment of whatsoever character, which offer was accepted, an agreement arose under the act of March 2, 1919, to pay for special facilities, and the evidence shows here that certain machinery known as the French machinery was included therein.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$723,310.75. Held, claimant entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$628,823.65 by reason of agreements alleged to have been entered into between the claimant and the United States.

2. The claim is for equipment supplied for the manufacture of Browning machines, Colt pistols, and 30/18 pistols (called the three arms), and also that supplied for the making of gun stocks, i. e., wood-working machinery.

The amount of the claim is \$590,552.52 for small-arms machinery and equipment, and \$38,271.13 for wood-working machinery and equipment.

3. Many of the facts which have an important bearing on the issues raised by the instant claim have been discussed or determined in the decisions of this board in the matter of the claim of the

erence is made.

4. The issue, broadly speaking, is as to whether the United States agreed to purchase machinery and equipment that had been used by the claimant in the manufacture by it of rifles for the French Government.

The claim must needs be split in two.

The facts which form the basis for an agreement for the purchase of facilities for the three arms are distinct from those on which is based an agreement for the purchase of wood-working machinery. If agreements were entered into they bore no important relation to each other. They will be considered separately.

#### DECISION.

##### "FACILITIES FOR THE THREE ARMS."

1. The Remington Co. undertook the manufacture of the three arms for the United States on different dates. Work on Browning machine guns began in the summer of 1917, on Colt pistols in December, 1917, and on the 30/18 pistols in January, 1918. It was not until March 22, 1918, that anything more definite in the way of a contract was entered into between the parties than that which resulted from conversations between Ordnance officers and representatives of the Remington Co. and from the exchange of letters and telegrams.

2. On March 22, 1918, three procurement orders were issued, one for each of the three arms, which provided that the United States should pay for such additional facilities as should be necessary for the manufacture of the three arms within the limits stated in each order and that the United States should acquire title to the facilities paid for.

3. Before March 22, 1918, the oral agreements had been that the United States should pay for and own such additional facilities as were needed by the Remington Co. for the manufacture of three arms. This agreement was stated in substantially that form in the so-called "letter contract" of January 23, 1918, which dealt with the 30/18 pistols or Pederson device.

4. The Remington Co. had been requested early in 1918 to furnish estimates as to the cost of the facilities that would be needed. Accordingly on February 20, 1918, in a letter written by C. C. Tyler, vice president of the Remington Co., to the Ordnance Department, Small Arms Section, estimates of cost of facilities were furnished. The summary of estimated costs shows a total of \$6,285,758, divided

guns, \$2,607,657.

The amounts authorized by the Procurement Orders of March 22, 1918, coincide with these estimates.

5. The testimony of the Ordnance officers coupled with their letters and the documentary proof demonstrate that it was the intention of the United States to buy the "French machinery" and the "Russian machinery" so far as any of it was necessary for the manufacture of the three arms.

It is not requisite that the statements of the officers of the United States should be set forth in detail. There is a substantial unanimity in their testimony on this matter. Attention will be directed to some of the more important and convincing letters.

6. The "French machinery" derives its name from the fact that it had been procured by the Remington Co. in 1915 and 1916 for the manufacture of rifles under a contract with the Republic of France. The contract was canceled by the French Government before any important deliveries of rifles had been made and after an expenditure by the Remington Co. of several millions of dollars. Less than \$100,000 has been paid the Remington Co. on account. Its loss is said to have been about four and one-half million dollars, for which claim was made against the French Government. The amount which should be received from the sale of any equipment that had been secured for the purpose of making French rifles would offset a part of the loss and would be deducted from the claim under the French contract. This was given by the Remington Co. as a controlling reason for making a sale of the "French machinery" rather than an agreement for its use by the United States. A sale liquidated as well as lessened its damages on account of the cancellation of the French contract.

There was never any doubt that the title to the "French machinery" was in the Remington Co., or that it had perfect freedom to dispose of it by sale. The French Government had no interest in the machinery and had no right to interfere with either its sale or use, and asserted none.

7. The question to be answered is therefore this: Did the United States agree to buy from the Remington Co. machinery and equipment to which the Remington Co. held title and the right to dispose of at its uncontrolled discretion?

The answer must be in the affirmative. There is little merit in discussing agreements which might have been made or which might have provided that the United States should not purchase the "French machinery" and should pay only for the use of such of the machinery as was necessary for the manufacture of the three arms. Our concern is to reach a conclusion on the evidence before us of

8. The losses to the Remington Co. on its French contract had been severe. Its financial condition in the latter part of 1917 and during a portion at least of 1918 was disquieting to its directors and to its creditors. It was desirous of turning its accumulation of machinery into cash. There is no doubt that the understanding of the representatives of the Remington Co. from the beginning was that the United States agreed to take and pay for such of the "French machinery" as was necessary for the manufacture of the three arms.

9. Some of the Ordnance officers testified that it was their purpose at the outset to acquire title as far as possible to arms-making machinery, that the supply of that kind of machinery was none too great, and that it was to the advantage of the United States to own the machinery and by so doing control the production of arms essential to the prosecution of the war.

10. The estimates furnished by the Remington Co. of the cost of the facilities contemplated the purchase by the United States of "French machinery."

The letter of February 20, 1918, which has been referred to, contains the following paragraph in relation to machine guns, after placing the estimated cost of machinery equipment at \$1,791,657:

"Orders for approximately \$2,500 of the machinery equipment should be placed immediately to secure the best deliveries possible. The remaining machinery equipment will be acquired by purchase of the French and Russian machinery already in the buildings."


In respect to Colt pistols, after estimating the cost of machinery equipment at \$1,582,926, the letter reads:

"Orders for approximately \$287,210.00 of machinery equipment should be placed immediately to secure the best deliveries possible. The remaining machinery equipment will be acquired by purchase of the French and Russian machinery already in the buildings."

As to the Pedersen device, after stating the estimated cost of machinery equipment to be \$880,884, the letter reads:

"Orders for approximately \$202,680.00 of machinery equipment should be placed immediately to secure the best deliveries possible. The remaining machinery equipment will be acquired by purchase of the French and Russian machinery already in the plant and by transfer of such machinery as may be at our Remington Ilion works, which is the property of the U. S. Government and is in excess of the needs of these works for the manufacture of the .30 caliber U. S. rifle, model 1917."

11. The letter of February 20 was addressed to the Production Division of the Ordnance Department, attention of Maj. Hayden Eames. A letter from Mr. Tyler to the Procurement Division of the



Ordnance Department, attention of Maj. E. A. Shepherd, gives the same figures as to estimated costs of facilities for the three arms. It contains the following paragraph:

"A large part of the machinery equipment necessary to arms manufacture is already located in our Remington Bridgeport works, known as French and Russian machinery, and can be acquired by purchase through negotiations within a short time."

12. Mr. Tyler's letter of February 27, 1918, to the Procurement Division of the Ordnance Department contains the following:

"The delay in the preparation of these estimates of machinery equipment is occasioned by the necessity of reviewing the equipment we have on hand at our Remington Bridgeport works, which was purchased for the manufacture of military rifles for the French and Russian Governments, to determine the machinery best adapted for the different new arms product, and the situation is further complicated by the fact that we have a limited number of machine tools at our Remington Ilion works which are in excess of our requirements for the manufacture of the .30 caliber U. S. rifle, model 1917, a part of which were purchased by the United States Government from Great Britain and a part being still the property of Great Britain.

"This machinery being available for prompt installation in rearranged departments, and the fact that it can be acquired at more advantageous prices than similar machine tools in the present market, makes it desirable to utilize all of this machinery equipment rather than to attempt to place orders in a market already overcrowded."

13. Mr. Tyler's letter of March 19, 1918, to the Procurement Division reads as follows:

"There are at present large numbers of machine tools at our Remington Bridgeport works which were purchased and used for the manufacture of 7.62 m/m rifles for the Russian Government; also many machine tools purchased for the manufacture of 8 m/m French Lebel rifles, and a great deal of miscellaneous equipment used in the manufacture of both of the above rifles.

\* \* \* \* \*

"In addition to the machinery equipment above referred to a number of machine tools of either the same or different classification will have to be purchased from machine-tool manufacturers to provide proper equipment for operations upon the three models of arms under consideration.

\* \* \* \* \*

"The summary of machine requirements indicate that a total of 4,436 machines are necessarily divided as to source as follows:

- 3,143 machines, Russian equipment, Bridgeport.
- 562 machines, French equipment, Bridgeport.
- 35 machines, British equipment, Ilion.
- 45 machines, U. S. Gov. equipment, Ilion.
- 651 machines, to be purchased outside.

---

4,436 total.

410 machines, French equipment, Bridgeport.

983 total.

"The miscellaneous equipment is divided as follows:

475 machines, Russian equipment, Bridgeport.

119 machines, French equipment, Bridgeport.

594 total.

14. Accompanying the letter of March 19, 1918, were schedules of machine requirements filling six pages, and tool-room machine requirements filling seven pages, and miscellaneous equipment requirements filling six pages.

Each schedule consisted of a list of equipment available and showed in columns the sources from which the machines would be derived, whether Russian, French, British, United States, or to be purchased outside.

15. The lists or schedules which were submitted by the Remington Co. on March 19 were authorized and approved by the Ordnance Department, as shown in the two letters below:

AFG:EJ

"WAR DEPARTMENT,  
"OFFICE OF THE CHIEF OF ORDNANCE,  
"PRODUCTION DIVISION,  
"SEVENTH AND B STREETS NW.,  
"Washington, April 4, 1918.

"Answer should be addressed to 'Small Arms Section, Production Division, Seventh and B Sts. NW., Washington, D. C.'

"In replying refer to No. M. S. 413.8/413.

"Remington Arms U. M. C. Co.

"Room 1026 Woodward Building,

"Washington, D. C.

"Attention of Mr. I. S. Betts.

"GENTLEMEN: 1. By direction of the Acting Chief of Ordnance, there is attached hereto copy of the folio containing lists of contemplated machinery submitted by you for the manufacture of:

"1. #44 Browning machine gun.

"2. Caliber .30 automatic pistol, model 1918.

"3. Caliber .45 automatic pistol, model 1911.

which increased machinery facilities you are authorized to proceed with on the following war orders signed by Colonel Samuel McRoberts of the Procurement Division:

"War Orders P-4577-1344 SA, dated March 22, 1918.

"War Orders P-4579-1346 Sa, dated March 22, 1918.

"This list of machinery is approved by the Production Division, subject to such minor changes as may arise during the course of its installation. You are requested to forward to the Production Division, through the inspector of ordnance at your works, information regarding any changes that may be necessary in the attached list.



"3. Due to the nature of this machinery, its operation and installation, it was necessary to compile the lists in such a manner as to include the machinery for the No. 44 Browning machine gun. This letter must not be considered to approve such machinery as is required for production of the machine gun.

"Respectfully,

"(By) (signed) "HAYDEN EAMES,  
"Major, Ordnance R. C.  
C. E. STAMP,  
"Captain, Ordnance R. C."  
ET/WWT

"WAR DEPARTMENT,  
"OFFICE OF THE CHIEF OF ORDNANCE,  
"PRODUCTION DIVISION,  
"SEVENTH & B STREETS NW.,  
"Washington, April 5, 1918.

"Answer should be addressed to 'Carriage Section, Production Division, Seventh and B Streets NW., Washington, D. C.'

"In replying refer to No.  
"Remington Arms U. M. C. Co.,  
"Room 1026 Woodward Building,  
"Washington, D. C.  
"Attention of Mr. I. S. Betts.

"SIRS: 1. I am directed by the Acting Chief of Ordnance to authorize you to proceed on War Order P-4565-1342 SA, calling for increased machinery facilities for manufacturing No. 44 Browning machine guns.

"This authorization supplements that given you in letter No. 413.8/413, dated April 4th, by Major Eames, of the Small Arms Section.

"3. The list of machinery required for the production of the Browning machine gun as related to the equipment for pistol production is understood to be subject to modification. The Production Division shall be notified of any such changes through the inspector of ordnance at your plant.

"Respectfully,

"By (signed) "J. G. SCRUGHAM,  
"Major, Ord. R. C.  
JAMES M. BOYLE,  
"Major, Ord. R. C."

16. The United States, in the early part of 1918, employed Mr. P. M. Brotherhood, of Manning, Maxwell & Moore, New York City, to act for it in appraising both the Russian and French machinery. William Rothen, of Henry Prentiss & Co. (Inc.), represented the Remington Co. On August 13, 1918, the appraisal of machinery and machine tools, but not the transmission equipment, was substantially completed. The following letter indicates that both Russian and French machinery were appraised:

“ Ordnance Department,  
“ War Department,  
“ 6th and B Streets,  
“ Washington, D. C.

“ Lieut. Colonel CHARLES N. BLACK.

“ DEAR SIR: I take pleasure in handing you herewith appraisal prices covering the machinery at the plant of the Remington Bridgeport works.

“ These prices have been agreed on by Henry Prentiss & Co., Inc., acting as Russian appraiser. The final checking up of prices was done yesterday.

“ The prices used were those prevailing on December 13, 1917, and apply to both the Russian and French machinery.

“ All prices given on the Russian machinery are subject to the fixed depreciations as given in the list furnished me by you.

“ Henry Prentiss & Co., Inc., have not as yet made the appraisal on French machinery, and for this reason have not agreed to the depreciations which I have mentioned in the list submitted to you.

“ I have given on the list what I think should cover the French machines.

“ Very respectfully, yours,

“ P. M. BROTHERHOOD (signed),

“ *Government Appraiser.*

“ Approved by Henry Prentiss & Co., Inc., per William Rother (signed).

“—enc—”

17. The French machinery was used in the manufacture of the three arms during the period from March, 1918, to November, 1918, as soon as it was found to be necessary. No charge has ever been made by the Remington Co. for its use on Government contracts. It was assumed on both sides that the United States had purchased it. The argument is made, not without force, that there was nothing in the relations between the Remington Co. and the United States which would warrant an inference that a gift of machinery or equipment was intended by the Remington Co. or expected by the United States.

18. In September, 1918, the appraisal of the Russian and French machines was finished and the suggestion made by the Ordnance Department that vouchers be put through on the basis of the inventories.

" WAR DEPARTMENT,  
" OFFICE OF THE CHIEF OF ORDNANCE,  
" PROCUREMENT DIVISION,  
" September 10, 1918.

" P413.8/4980.

" REMINGTON ARMS U. M. C. Co.,  
" Woodward Building, Washington, D. C.

" SIRs: 1. By direction of the Chief of Ordnance, this is to advise that we recently received an inventory of Russian and French machines which are being used on Government contracts for the manufacture of pistols and machine guns.

" 2. The French machinery was valued as of prevailing prices December 31, 1917, less such depreciation as had occurred in each of the various machines, as determined by Mr. Percy M. Brotherhood, Government appraiser.

" 3. The Russian machinery was valued as of prevailing prices December 31, 1917, less such depreciation as agreed in list of each of the various types of machine tools.

" 4. Mr. Brotherhood advises that copies of these inventories have been forwarded to the Remington Company and it is suggested that vouchers be put through on the basis of these inventories.

" 5. A copy of this inventory is being forwarded to the Bridgeport production office.

" Respectfully,

" SMALL ARMS SECTION,  
" H. B. JOHNSON (signed),  
" Captain, Ordnance, U. S. A."

19. The officers of the Accounting Division of the Ordnance Department, when the question of payment for the French machinery reached them, raised the objection that the Remington Co. should not be paid for this machinery, inasmuch as the title to it had been in the Remington Co. since 1915 and 1916.

An investigation was ordered under the direction of Maj. W. F. Jeffery and the conclusion reached that the Government had not been deceived as to the title to the machinery and that the Government should perform its agreement and make payment in accordance with the appraisal.

20. Maj. Jeffery's testimony clarifies the situation and it is quoted. He stated that he had seen letters from Mr. Kimball, president of the Remington Co., and from Mr. Wallace, its attorney, to the effect that it was the right and duty of the Remington Co. to sell the machinery belonging to it which had been used on the French rifle contract for the reason that it would liquidate or convert into dollars the equipment which had been purchased for the performance of that contract and would lessen the damages claimed against the French Republic.

ment for the value of that machinery. The question had originally come in to me in the form of an application from the district office, or the price approval officer, as to whether or not he could pass it for payment. There was some suggestion that a third party owned the property. I took it up with Mr. Kimball, and Mr. Kimball gave me that explanation. I felt that the question turned on whether or not the negotiating officers knew the exact facts; if they did, and under those facts intended that the Government should purchase and pay for the machinery, that they should be paid. I therefore wrote the Procurement Division requesting information on that point and received back a written statement from Procurement that the facts were known, and that it was intended that the Remington Company should be paid for this machinery; and I therefore issued necessary orders to pass this amount for payment.

"Mr. PRICE. What steps did you take upon receipt of that information?

"Mr. JEFFERY. I can not recall specifically because I can not remember just exactly how the matter came before me, but it was put up to me in some way to pass on the question as to whether or not this item should be passed and approved for payment.

"Mr. PRICE. I hand you a letter dated October 17, 1918, signed by you, addressed to the production manager, Bridgeport district ordnance office, and ask you if that is your letter relative to the French machinery.

"Mr. JEFFERY. Yes.

"(The letter referred to was thereupon received in evidence, marked 'Exhibit 143,' and is as follows:)

"GOVERNMENT EXHIBIT 143.

(Copy.)

"WPJ/eml.

"OCTOBER 17, 1918.

"Plant Section.

"Desk File No. 5.

"From: Ordnance Office, Production Division, Plant Section.

"To: Production manager, Bridgeport district ordnance office (attention Lt. G. W. Fowler), Bridgeport, Conn.

"Subject: French machinery—Remington Arms Company.

"1. Payment to Remington Arms Co. for French machinery was held up by this office pending investigation of question of title.

"2. The matter is now settled, and action should proceed according to the procurement order.

"By direction of Brig. Gen. C. C. Jamieson:

"WINTHROP SARGENT, Jr.,

"Lt. Col., Ord. Dept., U. S. A.

"By W. P. JEFFERY,

"Major, Ord. Dept., U. S. A.

"Mr. PRICE. I hand you a letter dated October 18, 1918, signed by you, addressed to Major Clarke, Administration, Accounting, and ask you if that is your letter.

"Mr. JEFFERY. Yes. This letter refreshes my recollection that the French machinery had been passed by the production officer for payment, but the question was raised by the cost-accounting people. It came to me through Major Clarke, of the Accounting Section, and we consulted as to the propriety of purchasing it in view of the claims made that the Remington Company and not the French Government owned the French machinery.

"Mr. PRICE. I offer that.

"(The letter referred to was thereupon received in evidence, marked 'Government Exhibit 144,' and is as follows:)

"GOVERNMENT EXHIBIT 144.

(Copy.)

"WPJ/eml.

"OCTOBER 18, 1918.

"Major Jeffery, Production, Plant.

"Major Clarke, Administration, Accounting.

"Remington Arms U. M. C.—Special Facilities—Machine-gun contract.

"1. Letter from your supervisor at Bridgeport returned.

"2. Investigation has disclosed the fact that title to the French machinery is, in fact, in the Remington Arms Co.

"3. The circumstances are, however, such that purchase by the Government is proper, and this office is advising the district office to proceed with the purchase and payment of property according to contract.

"W. P. JEFFERY,

"Major, Ord. Dept., U. S. A.

"Inclosure.

"Mr. PRICE. Was that machinery used in the facilities for the manufacture of the three arms?

"Mr. JEFFERY. I don't know personally as to the use of it, because I was never at the plant, but it was my understanding of the situation that it was to be acquired for use in production under some of the Remington contracts—which one I don't know.

"Mr. PRICE. Do you of your own personal knowledge know whether this machinery was embraced within the terms of the procurement orders covering the three arms facilities?

"Mr. JEFFERY. That was the question, as to whether or not under the order they had from the Government, the procurement order, the Government was obligated to buy this machinery. As I recall the transaction, such records as I could find indicated that they were. The question in my mind was whether the officials who negotiated that contract were aware of the interest or possible interest that Remington had in it, and, regardless of the terms of the contract, I felt that if they had committed the Government to the purchase of this machinery without knowledge of the fact it should be reinvestigated. I did not want to impose my decision as to the wisdom of purchasing it, so for that reason I took it up with Procurement and received back word from Procurement that they knew the facts and intended that the Government should purchase the machinery and pay for it.

of the procurement order?

"Mr. JEFFERY. Yes; it did, and whether that inclusion was with knowledge of the negotiating officers of the facts surrounding the title of that machinery.

"Mr. PRICE. What conclusion did you come to with reference to whether or not it was embraced within the terms of the procurement order?

"Mr. JEFFERY. I came to the conclusion it was, basing that upon the receipt of communication from the Procurement Division that that machinery was intended to be purchased and paid for by the Government. I can not remember the exact terms of the letter Procurement sent me."

21. As has been said, the testimony of the officers of the Procurement Division corroborates fully the testimony of Maj. Jeffery.

An agreement was entered into between the responsible officers of the Ordnance Department to purchase from the Remington Co. such portions of the machinery and equipment that had been procured for the manufacture of French rifles as were necessary for the manufacture of the three arms.

The agreements by which the United States undertook to furnish the facilities necessary for the manufacture of the three arms are described and stated in the decision of this Board in claim No. 1523 of the Remington Co.

The decision in the instant claim is that the "French machinery" comes within the scope of the agreements which the Board in claim No. 1523 has determined were entered into. In making awards to the Remington Co. in claim No. 1523, the value of the "French machinery" should be included. No reason was advanced why the values of the machinery as determined by the Government appraiser should not be accepted as the basis for relief.

#### DISPOSITION.

This claim will be transmitted to the Claims Board, Ordnance Department, for further proceedings pursuant to this decision.

#### WOODWORKING MACHINERY.

#### DECISION.

The acquisition of the woodworking or stock-making machinery was a distinct matter.

At the time of the issue of the procurement orders of March 22, 1918, it was not contemplated that the Remington Co. should manufacture gunstocks and no machinery or equipment for stock making



2. On May 23, 1918, Lieut. Col. Charles N. Black sent the Remington Co. a procurement order, numbered War Order P 8468-1686 Sa, calling for the manufacture of 300,000 stocks on a basis of cost plus a profit of 10 per cent.

The claimant was requested to accept this order, but did so only conditionally, as appears in its letter of June 6, 1918. The condition imposed was that "the United States acquire possession of the stock-making machinery, machine tools, and equipment necessary to enable us to execute this order."

3. On June 15, 1918, the Remington Co. wrote the Ordnance Department that no preparations were being made for the manufacture of gunstocks under the order of May 23, 1918, for two reasons: First, that it had not been advised that its conditions had been approved; and, second, that it understood that the order had been canceled, to be replaced by a new order for a larger number of stocks.

On June 21, 1918, Capt. H. B. Johnson wrote the Remington Co., in answer to the letter of June 15, 1918, that the 300,000-gunstock order was being canceled so that a larger order might be put through, and the terms and conditions of the order were under negotiation with the claimant.

4. On July 17, 1918, the Remington Co. sent Capt. Johnson a written offer to manufacture gun stocks on the following terms:

"Cost-plus fixed profit of 35¢ per stock and 5¢ for each pair of hand guards, the Government to pay all costs of labor and material, as well as the cost of all equipment of whatsoever character."

5. The offer of the Remington Co. was accepted in the following letter:

"NPB:fp

"WAR DEPARTMENT,

"OFFICE OF THE CHIEF OF ORDNANCE,

"PROCUREMENT DIVISION,

"Washington, August 28, 1918.

"Remington Arms U. M. C. Co.,

"1026 Woodward Bldg., Washington, D. C.

"P474.813/1644.

"Attention: I. S. Betts, vice president.

"Subject: Gunstocks and hand guards.

"Sms: 1. In further reference to your letter dated July 17th, file P474.813/1301, in regard the manufacture of gunstocks and hand guards for model 1917 rifle, at the Remington Bridgeport works, by direction of the Chief of Ordnance, please be advised that it is the desire of this office that you prepare immediately to manufacture 800,000 model 1917 gunstocks. It is understood that the Remington Bridgeport works is in position to deliver approximately 4,000 gunstocks per day. Information is requested in regard to deliveries and a definite schedule to cover.

is located at the Remington Bridgeport works, and will also cover the cost of tooling up, etc.

"3. Will state that your proposal as entered in your letter of July 17, 1918, for the manufacture of gunstocks as follows, is accepted:

"Cost-plus fixed profit of .35½ per stock and .05 for each pair of hand guards, Government to pay all costs of labor and material as well as the cost of all equipment of whatsoever character."

"It is understood that the total cost of machinery and equipment will not exceed \$426,340.00.

"4. Your early acceptance of this order is desired.

"Respectfully,

"(Signed)

"SMALL ARMS SECTION,  
H. B. JOHNSON,  
Captain, Ord. Dept., U. S. A."

6. Mr. Brotherhood was directed shortly after August 28, 1918, to appraise the Russian and French woodworking machinery, and he did so. The result of his appraisal reached the Ordnance Department on October 21, 1918, and on that day the following letter was sent to the claimant:

"HBJ/hed.

"WAR DEPARTMENT,  
"OFFICE OF THE CHIEF OF ORDNANCE,  
"PROCUREMENT DIVISION,  
"Washington, October 21, 1918.

"To insure prompt attention in replying, refer to ——— No. ———.  
Attention of Capt. H. B. Johnson, P474.813/2170.

"REMINGTON ARMS U. M. C. Co.,

"Woodward Building, Washington, D. C.

"SIRS: 1. By direction of the Chief of Ordnance, this is to advise that we have this day received an appraisal of the woodworking machinery used in the manufacture of model 1917 gunstocks at the Remington Bridgeport plant.

"2. Same has been forwarded to the Plant Facilities Section, and it is suggested that you submit voucher to the Bridgeport district office covering this machinery.

"Respectfully,

"(Signed)

"SMALL ARMS SECTION,  
H. B. JOHNSON,  
Captain, Ord. U. S. A."

7. The amount of "French" woodworking machinery was small as compared with the "Russian." The Russian Remington rifle contract trustees have filed a claim, No. 1536, with this Board in which a decision has been rendered and in which more of the details of this transaction are narrated. The decision should be referred to. Maj. Jeffery's testimony and letters which have been quoted above indicate a confirmation of the agreement to buy the French woodworking machinery after an investigation was made.

4. That such portion of the claim as originally filed with which is applicable to contract No. 2060-B of April 19, 1918, was not considered in the opinion of April 7, 1920.

5. Therefore, the Board of Contract Adjustment upon such portion of the claim as arose under contract *No. 2060-B of April 19, 1918*, finds that said contract No. 2060-B of April 19, 1918, was proxy signed and, therefore, an informal contract; that said contract called for the manufacture and delivery to the United States of 150,000 raincoats, of which said quantity 25,000 were to be delivered during the month of September, 1918, and 25,000 during the month of October, 1918; that on or about October 31, 1918, the Secretary of War telegraphed the claimant company as follows:

"Labor disputes have arisen which directly affect the performance of your contracts with the Government and which are causing and are likely to cause delay in making the deliveries period the Secretary of War requests you to submit such disputes for settlement to Honorable Julian W. Mack, Major Bernol J. Rosensohn, and Professor William S. Ripley who are his duly authorized representatives for purpose of settling such disputes under terms period in such submission you must agree to accede to and comply with all the terms of such settlement period the above-named representatives of the Secretary of War will have the power to direct that a fair and just addition to the contract price shall be made in case an increase in wage is granted and to require a deduction to be made from the contract price in case the labor costs are reduced period by order of the Secretary of War.

Major F. W. TULLY,  
*Office of the Secretary of War.*"

6. Thereafter the said duly constituted Board of Arbitrators after investigation made an award; said award granted an increase of 14 cents per garment to be paid to the workers, thus increasing the cost to the manufacturer by that amount.

7. The award also provided as follows:

"It is directed as a part of the adjustment made by us that a fair and just addition to the contract price shall be made therefor to the extent of the actual increased cost upon proof by affidavit of the actual amount of increased cost.

"It further certified that the contractors named therein (the claimant being included) have in all respects lived up to the terms and conditions of the contract, and, to the extent to which they have not done so, such breach may be waived for this purpose only."

8. Said award was retroactive and was to take effect as of September 9, 1918.

9. The contractor accepted the award and proceeded to make the adjustments therein called for with its employees.

whereby the Government is obligated to reimburse the contractor at the rate of 14 cents per garment for all garments manufactured under said contract No. 2060-B on and after September 9, 1918.

11. The Board does not undertake to determine the number of garments made on either contract after September 9, 1918, nor does it undertake to determine whether the amount claimed by the contractor—namely, \$9,205.81—is correct.

12. Certificate C will issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, supply circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.

JUNE 19, 1920.

**Case No. 2754.**

*In re* **CLAIM OF PIERCE-ARROW MOTOR CAR CO.**

1. **INDEPENDENT CONTEMPORANEOUS AGREEMENT.**—Where the proposal submitted by claimant contained a stipulation that all taxes thereafter imposed by Congress should be taken care of or paid by the Government, and this stipulation was omitted from the formal contract, which claimant refused to sign or perform until assured and promised by duly authorized Government officers that the taxes, if imposed, would be taken care of through the medium of a separate agreement, and relying thereon claimant executes and performs said contract and taxes are imposed, an implied agreement arose under the act of March 2, 1919, to reimburse claimant for such taxes.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$241,114.32 was taxes. Held, claimant entitled to recover.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed for \$241,114.32, that sum being taxes under section 600 of the revenue act of October 3, 1917, upon 2,500 standard 2-ton Pierce-Arrow truck chassis sold and delivered by claimant to the United States of America as hereinafter mentioned. The sum mentioned has been paid to claimant in accordance with the interpretation of the contract hereinafter mentioned adopted by claimant and the disbursing officer or officers who paid the same. The Treasury Department having demanded a refund of this sum, claimant brings this proceeding.

A hearing was held before this Board on June 10, 1920.

**FINDINGS OF FACT.**

1. Claimant is a corporation organized and existing under the laws of the State of New York.

2. Under date of May 12, 1917, the Quartermaster Corps, United States Army, caused to be issued and circulated an advertisement inviting proposals for gasoline motor truck chassis as therein specified, *bids to be opened June 10, 1917*, at the office of Quartermaster Corps, Chicago, Ill.

3. Pursuant to said advertisement, claimant prepared and submitted a sealed bid on Quartermaster Form No. 118, dated June 7,

1917, and numbered "*Bid No. 2*," for 800 standard 2-ton Pierce-Arrow truck chassis, having special equipment called for, at \$3,500 each, and 800 motor transport bodies, United States Government drawing No. T-105, May 15, 1917, at \$250 each. This bid contained the following clause:

"This bid is made subject to strikes, fire, and is also subject to increase in price over present current prices equal to any tax hereafter imposed by the United States Government upon the Pierce-Arrow Motor Car Co. or its product other than excess-profit tax."

4. Under date of July 23, 1917, a communication was dispatched by authority of the depot quartermaster, Chicago, Ill., and was duly received by claimant, the material portions of which are as follows:

[Order No. 343. File No. 451.2. Depot quartermaster.]

"JULY 23, 1917.

"PIERCE-ARROW MOTOR CAR CO.,  
"Buffalo, N. Y.

"Award 800 class A motor trucks, schedule 544.

"1. Under authority from the Quartermaster General in telegram to depot quartermaster, Chicago, Ill., July 16, 1917, award is made you, *in accordance with your proposal to this depot, opened June 10, 1917*, under our Schedule No. 544, to furnish to the United States the following (bills in triplicate to be sent to this office for payment):

"800 standard 2-ton Pierce-Arrow truck chassis, with 4 speed transmission, low gearing, and to detailed specifications addended to Pierce-Arrow bid *No. 2*, opened June 10, 1917. at Chicago, Ill.

\* \* \* \* \*

"3. This equipment is desired for immediate use by the Government for military purposes, and is requested that delivery be made at an early a date as possible."

5. Under date of July 26, 1917, a further communication was dispatched from the office of the depot quartermaster, Chicago, Ill., and duly received by claimant as follows:

"WAR DEPARTMENT,  
"GENERAL DEPOT OF THE QUARTERMASTER CORPS,  
"3615 Iron Street, Chicago, Ill., July 26, 1917.

"Address reply to depot quartermaster.

"From: Depot quartermaster.

"To: Pierce-Arrow Motor Car Company, Buffalo, New York.

"Subject: Award of 1,500 Class 'A' chassis.

"1. You are advised that by direction to this office, by the office of the Quartermaster General, their telegram dated July 25th, 1917, that formal award will be made you for fifteen hundred (1,500) Class 'A' chassis, *in accordance with bidders proposal Number 2*. Deliveries in accordance proposal price, each thirty-five hundred dollars (\$3,500).



"2. You may proceed with the procurement of materials on this notice; formal award follows as quickly as it can be prepared.

"By authority of the depot quartermaster:

"M. B. EDGERTON,  
"Major, Q. M., U. S. R.

"MBE:ALM."

6. Under date of July 28, 1917, a communication was dispatched by authority of the depot quartermaster, Chicago, Ill., and was duly received by claimant, as follows:

"WAR DEPARTMENT,  
"GENERAL DEPOT OF THE QUARTERMASTER CORPS,  
"2615 Iron Street, Chicago, Ill., July 28, 1917.

"Address reply to depot quartermaster.

"From: Depot quartermaster.

"To: Pierce-Arrow Motor Car Co., Buffalo, N. Y.

"Subject: Award, Schedule No. 544.

"1. Attached will be found award made your company to-day for 1,500 class A motor trucks, *per specifications included in your proposal #2, opened* under schedule #544 at Chicago, Ill., *June 10, 1917.*

"2. Direction for this award was received from the Quartermaster General of the Army in a telegram to the depot quartermaster, dated July 25th.

"3. In the event any exceptions to this award are desired taken this office should be notified promptly for proper action.

"By authority of depot quartermaster.

"M. B. EDGERTON,  
"Major, Q. M., U. S. R.

"MBE/AC"

7. Thereafter a formal contract, numbered 451.2-145 between Col. A. D. Kniskern, Quartermaster Corps, United States Army, as contracting officer, and claimant, dated July 23, 1917, for 2,300 2-ton Pierce-Arrow motor truck chassis, was prepared and sent to claimant for execution. This contract reached claimant's office at Buffalo, N. Y., on or about August 7, 1917.

Upon examination of this contract by claimant it was discovered that no clause relative to taxes upon claimant or its product, in conformity with paragraph 5 of its proposal or bid No. 2, as quoted in Finding 3 *supra*, had been incorporated therein. Claimant promptly, on August 10, 1917, through its truck sales manager, Robert O. Patten, took the matter up with Capt. Arthur H. Leavitt, quartermaster, Reserve Corps, United States Army, on duty at the depot quartermaster's office, Chicago, Ill., as assistant to the depot quartermaster.

At said interview Mr. Patten stated to Capt. Leavitt that claimant was unwilling to execute the contract because it did not feel that it was protected in the matter of taxes. Capt. Leavitt replied that

claimant was protected under the bid it had made and also under the letters of award. Mr. Patten then asked to have appropriate clause inserted in the contract, which Capt. Leavitt responded could not be done because there was no law then in effect imposing any such tax, but assured Mr. Patten that the Government would protect claimant against the imposition of any such tax. This assurance was given by Capt. Leavitt by direction of his superior, Col. A. D. Eniskern, depot quartermaster at Chicago, Ill.

8. Mr. Patten returned to Buffalo and reported to claimant's executive committee the result of his interview with Capt. Leavitt and the assurance given by the latter that the Government would protect claimant in the matter of any taxes which might be imposed. In reliance upon this assurance, claimant executed contract No. 451.2-145, above referred to, which provided for the furnishing and delivering to the United States:

2,300 standard 2-ton Pierce-Arrow motor truck chassis, at \$3,500 each, which price was thereafter increased to \$3,583.45 each to cover additional equipment.

9. Thereafter and prior to the first delivery of chassis called for by said contract, the revenue act of October 3, 1917, was enacted, by section 600, of which a sales tax of 3 per cent on automobiles was imposed.

10. On or about November 3, 1917, the following telegram was dispatched from the office of the Quartermaster General, Washington, D. C., to the depot quartermaster, Chicago, Ill., and duly received by the latter.

"WASHINGTON, D. C., Nov. 3-17.

"DEPOT Q. M., Chgo., Ill.

"Retel yesterday signed Ecker. Allow tax where specified in proposal when claimed. No voluntary action toward payment to be made.

SHARPE,  
Per MITCHELL.

"Received 11/3/17, 2.30 p. m.

"Referred to Col. Kniskern.

"Copy to Lt. Ecker, Mr. Griffin, Mr. Peterson, Mr. Parker."

11. The first shipment of chassis under said contract was made on or about November 23, 1917. Delivery was made to a Government inspector at Buffalo, N. Y. His receipts were attached to invoices which included the war tax of 3 per cent as a separate item. These invoices were presented by Mr. Patten at the Depot Quartermaster's office at Chicago, Ill., and paid.

The same procedure was thereafter adopted in the case of each subsequent delivery. The tax in question was included in the invoice in each case and paid by the disbursing officer. Claimant in

tax and received by it from the disbursing officer was the sum of \$241,114.32.

12. Thereafter, and shortly after the date which it bears, the following communication was received by claimant:

"WAR DEPARTMENT,  
"FINANCE SERVICE,  
"OFFICE OF THE DIRECTOR OF FINANCE,  
"Washington, July 10, 1919.

"File No. 132.6 FM-2 (Arnold, Le. D. W.)

"PIERCE-ARROW MOTOR CAR CO.,  
"1695 Elmwood Ave., Buffalo, N. Y.

"GENTLEMEN: 1. You are advised that the Comptroller of the Treasury has disallowed all payments to you to cover war tax paid under your contract dated July 23, 1917. A schedule of vouchers and amounts as paid, together with the auditor's advice of disallowance, is attached hereto.

"2. Inasmuch as your contract makes no provision for these payments, and from the further fact that the matter has been passed upon by the Comptroller of the Treasury, who is the highest accounting official, and the same disallowed, you are requested to send your check payable to the Treasurer of the United States in the sum of \$145,886.18, to cover the amount erroneously paid to you.

"By authority of the director of finance.

"T. W. BRAMHALL,  
"1st Lt. Ord. Dept. U. S. A.

"TWB/dk."

13. Thereafter claimant received various communications from the office of the director of finance, zone finance officer, Chicago, Ill., and Treasury Department, Office of Auditor for the War Department, not necessary to be set forth here at length, the substance of which communications was the disallowance of the full sum of \$241,114.32 above mentioned, and notice that payments to claimant under other contracts were withheld pending the refund by it of said sum.

14. The only difference between the facts of this case and those of *Locomobile Co. of America No. 2502*, recently decided by this Board, is that in the *Locomobile Co.* case the tax included in the first invoice was disallowed, whereupon claimant informed the contracting officer that, unless the Government assumed the tax as agreed, claimant would make no further deliveries. This was prior to the sending of the telegram from the Quartermaster General's office quoted in Finding 10, after the receipt of which the taxes were allowed and paid.

In this case the first delivery was not made nor the invoice therefor rendered until after the ruling of the Quartermaster General's office

therefore, made in the case of this claimant.

15. The act of March 2, 1919, authorizes the Secretary of War, in exercising the authority thereby conferred upon him, to proceed "upon a fair and equitable basis." The foregoing facts show that the clear and expressed intention of the parties was that if Congress should enact any law during the life of the contract imposing a tax which should increase the cost to the contractor of the product, the amount of such tax should be added to the contract price.

Claimant inserted in its bid the express stipulation that the amount of any such tax as Congress thereafter actually did impose was to be added to the price quoted by it. It was notified that its bid had been accepted and in each case the letter of notification specifically referred to the bid. It was vigilant in detecting the omission from the formal contract of any clause covering the contingency against which it had sought to protect itself, and brought the matter promptly to the attention of the contracting officer, who, through his duly authorized representative, assured it that its bid was part of the agreement and that it was amply protected without anything further. This understanding was acted upon throughout the performance of the contract, and the Government paid the additional amount of the tax without protest and received and had the benefit of the articles.

It is evident that claimant would not have agreed to supply the articles desired at the price quoted unless it had relied upon this assurance. It is neither fair nor equitable, whether the latter word be used in its technical or popular sense, to hold that the omission of a tax clause from the formal contract has the effect of mulcting claimant of what it was contemplated all through the negotiations and expressly agreed it should receive.

16. The reason assigned for the omission of the tax clause from the formal contract as it appears in the record in this case seems unsatisfactory, but light is thrown upon it by the decision of this Board in *General Tire & Rubber Co. No. 2177*, where a similar question arose regarding the crating of tires. In that case it appeared that a clause inserted in a formal contract providing that the cost of the crating when ascertained should be added to the flat price per tire was disapproved by the Board of Review of the Office of Director of Purchase, upon the theory that no contract could be entered into binding the United States to pay a sum of money undetermined as to amount. It is not necessary for this Board in the present case to express any opinion as to the correctness of this theory, but the evidence establishes its existence and that contracting officers considered themselves bound thereby.

part of the Government to recede from its previous agreement that the tax, if imposed, should be added to the price. But the omission in this case is fully explained by the existence of the ruling mentioned, and the established fact that it was known to the contracting officer and advanced by him as his reason for not preparing the contract in accordance with the bid and acceptance in this respect.

17. This Board therefore finds and decides that there was an agreement within the purview of the act of March 2, 1919, between the claimant and an officer acting under the authority, direction, and instruction of the Secretary of War to reimburse claimant for any tax which might, after the negotiation of the contract, be imposed upon it by the United States Government, other than excess profits tax, and that claimant is entitled to the relief petitioned for.

#### DISPOSITION.

This Board will make, transmit, and deliver a statement of the nature, terms, and conditions of the agreement and Certificate C to Claims Board, Director of Purchase for action in the manner provided under specification of section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, March 3, 1919.

Col. Delafield and Capt. Morgan concurring.

JUNE 19, 1920.

Case No. 2668.

*In re* CLAIM OF RIVERSIDE METAL CO.

- 1 **NOTIFICATION OF AWARD.**—A notification of an award of a contract accepted by claimant and followed by delivery of manufactured articles constituted an informal contract within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$6,024.74, based upon a written agreement for the manufacture of brass sheets. Held, claimant is entitled to relief.

Mr. Averill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$6,024.74 by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. Under date of April 25, 1918, the Riverside Metal Co. of Riverside, N. J. (the claimant), received from the office of the depot quartermaster, New York City, an award for brass sheets annealed and pickled, Serial No. 21518, it being stated in said award that "contract covering the above award will be prepared in this office and sent to you for execution." No such contract was ever executed.
3. By the terms of the award the claimant was to furnish to the Government 63 tons of brass sheets for overseas shipment.
4. On October 1, 1918, the depot quartermaster, New York City, in writing increased the amount of said award approximately 7,000 pounds.
5. Claimant proceeded with the performance and made deliveries, which deliveries were accepted, and on or about November 15, 1918, claimant was instructed to suspend operation as the articles were no longer needed for overseas shipment. Claimant complied with these instructions and suspended operation.



6. On the date of suspension claimant alleges that it had on hand:

	Pounds
Finished brass sheets boxed ready for shipment-----	2, 504
Brass sheets in the rolling mill semifinished-----	12, 623
Raw material purchased at the market price for the purpose of filling this order -----	18, 000

7. The claimant is asking compensation for the finished and semi-finished sheets and for the raw material purchased for the purpose of filling the order.

8. Neither the record nor any fact brought out at the hearing explains why the usual audits and preliminary negotiations for a settlement award were not made.

#### DECISION.

1. The order or letter of award, dated April 25, 1918 (issuing from the office of the depot quartermaster, New York City, by Alex. R. Piper, Lt. Col., Q. M. C., by H. P. Hill, Capt., Q. M. R. C.), and its acceptance by the claimant and the delivery thereunder to the United States of a portion of the articles called for constitutes an informal contract within the purview of the act of March 2, 1919, whereby the Government is obligated to reimburse claimant for the finished and semifinished articles on hand and to compensate claimant for any loss which may have been sustained on raw material furnished solely for the performance of said informal contract and not in excess of the requirements of said contract.

2. Certificate C will issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director, of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Hopkins concurring.

JUNE 23, 1920.

Case No. 2610.

*In re* CLAIM OF F. L. O'BRIEN.

1. **CHANGED SPECIFICATIONS — IMPLIED AGREEMENT.**—Where claimant's contract to manufacture a quantity of barrack bags was entered into with the understanding that the bags were to be made according to certain samples and specifications submitted, and where the Government required them to be made of a different material and a different design than that called for in the contract, which necessitated additional expense for claimant, and where claimant was required thereby to do what was not contemplated by the original contract, there arose under the circumstances an implied agreement within the purview of the act of March 2, 1919, under which the Government is obligated to reimburse claimant for the loss sustained by the reason of the changed conditions.
2. **CLAIM AND DECISION.**—This claim for \$3,209.36 arises under the act of March 2, 1919, and is presented upon the theory that the Government is obligated to reimburse claimant for extra cost occasioned by changes made in specifications. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Informal statement of claim has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$3,209.36, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On April 11, 1918, the claimant, Miss F. L. O'Brien, entered into a proxy-signed contract, No. 1749-N, with the Quartermaster Corps, United States Army, for the manufacture of 50,000 barrack bags for approximately the sum of \$4,250, said barrack bags to be made according to certain specifications as to size, cut, and to be made of 8-ounce blue denim, conforming in every respect to the existing standard sample and specifications.

3. The said blue denim and the one-quarter-inch braided cotton cord for the drawing strings was to be furnished by the Government. The sample furnished by the Government and upon which the claimant made its bid was a soft blue denim which could easily have been

handled by women operators and on the light type of sewing machines which the claimant had in her little plant.

4. The Government did not furnish blue denim of the weight specified, nor did it furnish the light one-quarter-inch cotton cord, but in lieu thereof furnished the claimant gray sateen and later olive drab moleskin, both of which were of a much heavier weight and texture, and in place of the lighter cord furnished the claimant a heavy stiff highly glazed gilling line or halyard cord.

5. The claimant protested against the material furnished, but was told that there was no blue denim available and that claimant would have to proceed to make the barrack bags out of the material furnished.

6. The material furnished being much too heavy for the light sewing machines with which the claimant's factory was equipped caused great delay in the manufacture, and the women employees were unable to handle the heavier goods, so that claimant was compelled to employ men, who, by reason of their greater strength and their familiarity with work upon heavier fabrics, were more capable of turning out production. The employment of men necessitated a large increase in the rate of wages and added materially to the expense attending the manufacture.

7. The sample bag furnished by the Government had a bottom made of one piece, but after some 1,500 bags had been made orders were issued changing the specifications and instructing that the bottoms of the bags should be cut in two pieces from the straight selvage side of material, thus requiring extra cutting and handling, two rows of extra stitching, and the use of considerable more thread.

8. The original contract did not require that the bags should be wrapped for delivery, but after work commenced orders were issued by the Government that the bags should be wrapped in wrapping paper and tied with twine, both of which caused extra expense to the contractor.

9. The claimant completed the contract and delivered to the Government 49,500 bags and received therefor \$4,187.50, but claimant's total expenses in performing the contract was \$7,376.86, and claim is filed for the difference, \$3,209.36, occasioned by reason of the failure of the Government to deliver material of the weight and kind specified in the contract and by reason of the changes in specifications.

10. The evidence also shows that Miss F. L. O'Brien (the claimant) is the daughter of an honorably discharged veteran of the Civil War, being a member of the Thirty-seventh New York Infantry (Irish Rifles), and that for 12 years prior to the war with the Imperial German Government, Miss F. L. O'Brien (the claimant) had been constantly employed in the manufacture of white

beginning of the war with the Imperial German Government, Miss F. L. O'Brien (the claimant) offered her factory to the Government for the manufacture of cotton blouses for the Army, the factory being equipped to handle such light class of work. She was, however, advised by the officers in charge that there was more urgent need for barrack bags than for blouses and was shown a sample of the light blue denim from which the barrack bags were to be made, and finding that same could be handled with her equipment, accepted a contract from the Government, which work she would not have accepted had she known that a much heavier material would be furnished.

#### DECISION.

1. From the facts and circumstances of the case, the Board is of the opinion that an implied agreement within the provisions of the act of March 2, 1919, arises whereby the Government is obligated to pay to Miss F. L. O'Brien the extra expense to which the contractor was put by reason of the changes in specifications and the failure of the Government to furnish material in accordance with the specifications of the contract.

2. Certificate C will issue.

#### DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Averill concurring.

JUNE 24, 1920.

Case No. 2559.

*In re* CLAIM OF RAUH & MACK SHIRT CO.

1. **REJECTED GARMENTS—EXPENSE OF REMODELING—METHOD OF SETTLEMENT.**—Where claimant's contract for the manufacture of shirts provided that all rejected garments be removed from place of delivery by contractor within 10 days after notice of rejection, and where the Government failed to give contractor the proper notice of such rejection, the Government was not authorized to repair or remodel said shirts to meet the requirements of the contract and charge the expense thereof against the amount due the claimant on the contract, and where this method was pursued the claimant is entitled to recover back the difference between what it can show the repairs would have cost it in its own factory and the amount that the Government charged claimant for such repairs in the settlement.
2. **CLAIM AND DECISION.**—This claim for \$1,500 is an appeal from the decision of the Claims Board, Director of Purchase, on an alleged informal contract. Held, claimant is entitled to relief.

Maj. Miller writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Director of Purchase, on a claim for approximately \$1,500 alleged to be due on an informally executed contract.

2. On June 18, 1918, a contract was signed by the claimant, the Rauh & Mack Shirt Co., of Cincinnati, Ohio, and Col. H. J. Hirsch, Quartermaster Corps, by Capt. S. W. Shaffer, Q. M. R. C., whereby claimant was to manufacture 44,000 flannel shirts at 48 cents per shirt, the Government furnishing all materials except the thread. The clauses referring to inspection and rejection of the shirts provide:

“The final inspection to be made at the place where delivery is required.

- “3. That the articles herein contracted for shall be examined and inspected, without unnecessary delay after being delivered, by a person or persons appointed by the United States; and upon such inspection the articles found to be in all respects as required by this

demned or rejected, shall be removed from the premises by the contractor within 10 days after the said contractor or his agent shall have been notified of such rejection; otherwise, at the risk and expense of the contractor."

3. During the months of October and November, 1918, claimant shipped to the Jeffersonville depot, Jeffersonville, Ind., 41,217 shirts (claimed by claimant as 41,260) a difference of 43 shirts. Of four early shipments the depot rejected and returned to claimant for repairs 557 shirts out of 13,798. The zone supply officer found a higher percentage in the later shipments (all except one made after the armistice). Out of 27,419 shirts, a total of 7,146 were rejected and repaired at the Jeffersonville depot instead of being returned to the contractor for repairs.

4. The zone supply officer of Jeffersonville, Ind., states that the cost of repairing these 7,146 shirts was \$1,603.04, or an average cost per shirt of \$0.2243, and this amount has been deducted from payments made to the claimant.

5. Claimant alleges that under the terms of the agreement it should have been given an opportunity to make repairs on the 7,146 shirts; that the rejections were too high as evidenced by the small percentage of rejections resulting from the early shipments; that it could have made the repairs on the 7,146 shirts at an expense of less than \$500.

6. Claimant has submitted an affidavit in which it shows that the repair work on the 557 shirts returned to the claimant was done at an expense not exceeding \$24. Mr. J. W. Mack, president of the company, testified that he had examined the detailed reports of cost of repairs covering 6,076 shirts as submitted by the zone supply officer, and that whereas the Government made a charge of \$1,015.25 for repairing these 6,076 shirts, claimant could have made these repairs at a maximum cost of from \$250 to \$333.22, including freight. He omitted some charges amounting to \$66.35, which he stated could not be estimated. This would make the maximum cost of repairing 6,076 shirts not more than \$399.57. While the zone supply officer did not furnish a detailed statement covering repairs on the balance of 1,070 shirts, claimant's maximum estimate for the expense of repairing this additional number, if figured on the same basis as the 6,076 shirts, would make a total of \$469.92 for repairing 7,146 shirts. This has the effect of reducing the claim from \$1,500 to \$1,030.08.

7. Mr. C. E. Lightfoot, chief cutter (designer) for the Quartermaster Corps, testified at the hearing that the charges made by the Jeffersonville depot for these repairs were excessive. For in-



stance, he said that the cost for replacing a pocket should not exceed  $2\frac{1}{2}$  cents per shirt whereas the Jeffersonville depot had charged between 19 and 20 cents for this service. He estimated a cost of 4 cents for resetting a collar as against a charge of 9 cents made by the Jeffersonville depot (Tr. pp. 88-93). He showed that the charge for each of the other eight operations was likewise too high (Tr. pp. 94-103). His estimate as to the proper charges for repairs is not higher than that of claimant.

8. Maj. H. B. Williams, Quartermaster Corps, special assistant to the chief of the Clothing and Equipage Division, Office of the Director of Purchase, testified that the universal custom of the Quartermaster Corps under contracts of this nature was to return rejected shirts, or similar articles, to the contractor for repairs. Maj. Williams also testified that after the armistice no instructions were issued changing the manner of inspection. This testimony was given in reply to the following question propounded by claimant's attorney: "Is it not also a fact that the Government after the armistice became more rigid in its inspection?"

9. The Claims Board, Director of Purchase, issued a form C certificate, on the proxy-signed contract, but denied claimant any relief on the claim of excessive charges for repairs.

#### DECISION.

1. The flannel shirts shipped by claimant to the Jeffersonville depot were examined and inspected by the Government in accordance with the terms of the contract; and the result of the inspection must be accepted by claimant under its agreement with the Government. The Government inspectors had full authority to say whether each shirt had been properly manufactured in accordance with specifications. Claimant's contention that rejections were too high can not be entertained by this Board. It was necessary, therefore, to repair 7,146 shirts.

2. The question then arises as to whether the Government should have returned the rejected shirts to claimant. The contract provides for the removal by claimant of all rejected articles within 10 days after notification of rejection. This seems to provide for an opportunity for the contractor to make the repairs. Considering also the fact that it had been the custom of the Quartermaster Corps to return such articles for repairs, there remains no doubt but that the contractor should have been notified of the rejections in order that it might have made the repairs. Claimant should have been permitted to make its own repairs.

3. The charge of \$1,603.04 for repairing these shirts is excessive. Claimant could have made the repairs for much less than this

4. Claimant failed to prove that the Government figures showing the receipt of 41,217 shirts, instead of 41,260, were not correct, and the Board finds that the Government received only the smaller quantity. This item of the claim is rejected.

DISPOSITION.

The Board of Contract Adjustment will transmit its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Mr. Reilly concurring.

JUNE 24, 1920.

Case No. 2684.

*In re* CLAIM OF KANSAS CITY STRUCTURAL STEEL CO.

1. **DELAY IN DELIVERY CAUSED BY CHANGES IN PLANS AND SPECIFICATIONS.**—The claimant, in the performance of a contract calling for the delivery of steel on a specific date, is not chargeable with delay occasioned by changes made by the Government in the plans and specifications.
2. **SAME—WAIVER.**—Where claimant contracted to deliver steel at a specified date the Government waived its rights as to the time of delivery by accepting the steel on a later date.
3. **CONTRACT PRICE—NOT BONUS.**—Where claimant contracted to furnish a quantity of stock steel with a stipulation that it was to receive \$24 per ton additional for such steel such additional compensation is not a bonus and does not prevent the claimant from recovering the full contract price as stipulated by such contract.
4. **CLAIM AND DECISION.**—This claim for \$15,998.57 arises under the act of March 2, 1919, and is presented upon the theory that the settlement made with claimant was not in accordance with its agreement with the Government. Held, claimant is entitled to relief.

Mr. Henry writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim was filed with this Board under an informal petition, by reason of an agreement alleged to have been entered into between the claimant company and an officer or agent acting under the authority of the Secretary of War.

The claim is for the agreed price of "stock" structural steel as provided under Requisition Nos. 9-K and 11-J, issued July 1, 1918, by authority of the officer in charge of Construction Division, War Department, to be used in the erection of mechanical repair unit No. 304, located at Camp Normoyle, near San Antonio, Tex.

A hearing was held June 8, 1920.

STATEMENT OF FACTS.

1. On June 19, 1918, the Construction Division, War Department, issued the following request for bids on fabricated structural steel:

"1. You are invited to submit an estimate on or before the 28th of June for the mechanical repair unit at San Antonio, Tex., as shown in the accompanying plans. Quote a price per ton for the storage building and for the machine shop separately. Price quoted to be per ton, scale weights, for the material f. o. b. plant, with the amount of freight from plant to destination quoted as a separate

also time required for erection and a price per ton."

2. On June 28, the claimant company, in response to said request, submitted, in writing, to Capt. John A. Goodearl, the purchasing officer in charge of these negotiations for the Construction Division, a proposal in accordance with requirements based on plans submitted covering such structural steel and quoting the following prices per ton on "mill" and "stock" material, respectively:

(a) Mill material (i. e., material ordered from rolling mills, cut to proper length and ready for construction), \$103 per ton

(b) Stock material (i. e., material of various designs and lengths as carried in warehouses and fabricating plants) \$24.00 per ton in excess of mill material, or \$127 per ton.

"This proposal is made for immediate acceptance, and upon the understanding that if accepted the following conditions are agreed to: All agreements are contingent upon ability to procure materials from rolling mills, and upon strikes, accidents, and other delays beyond our reasonable control."

3. Claimant's proposal of June 28, 1918, was delivered personally to Capt. Goodearl by Mr. W. D. Truman, contracting engineer of claimant company, and at the same time, and as part of the same transaction, they discussed the plans of the building into which the steel was to go. These plans contemplated a duplicate of a building which the Construction Division had already built in Baltimore. Capt. Goodearl told Mr. Truman that he would be furnished detail plans; that it was important that as much of the finished product as possible should be fabricated from steel shapes already held in "stocks" (its own and other manufacturers') because the rolling mills were overburdened with orders; that "Bethlehem" shapes were to be preferred over other mill shapes, because they were the most economical of material, and that he would arrange for priority orders on all shapes going to claimant. It was also understood between them that the \$24 difference between "mill" and "stock" steel prices represented the approximate market price difference at this time which claimant would have to pay for its raw materials. At this time, also, the congestion in the rolling mills was so great that the War Industries Board had instructed the Construction Division to exhaust, first, existing supplies of "stock," regardless of cost.

4. The work which claimant proposed to do was the fabricating into structural building parts, ready for erecting, of steel shapes as turned out from rolling mills. As respects availability for this purpose, there is no essential distinction between mill and stock steel. The difference seems to be that steel in stock consists, to a large extent, of already partly or completely fabricated material, mill

steel being the larger and unfabricated shapes which are rolled as needed. As regards the particular work that claimant was to do, the completed product was of such type as to require the use of both kinds of shapes, the fabrication of much the larger part of the order calling for a combination of the two forms. This seems to have been clearly understood by both parties. Capt. Goodearl, in fact, seems to have had in mind by "stock" steel only foundation plates and bolts, though no such precise definition was agreed on.

5. Claimant's bid being the lowest received, a requisition order bearing Nos. 9-K and 11-J was issued on July 1, 1918, to claimant, containing the following language:

"You are hereby authorized to proceed with immediate production of the following materials:

Furnish approximately 1,600 tons structural steel, including one (1) shop coat of paint, fabricated *as per plans prepared by the Construction Division, using Bethlehem substitutions*, for the sum of one hundred three (\$103.00) dollars per ton (scale weights) f. o. b. cars Kansas City, Mo.

*For all material taken from your stock, the additional sum of twenty-four (\$24.00) dollars.*

*Stock material to be shipped at once.* Complete shipment of Bethlehem sections by August 20th consistent with the delivery of Bethlehem material at your plant at Kansas City by August 10th.

*It is also understood that you will furnish all standard material from stock—yours or others."*

6. The claimant company proceeded at once to locate sources of supply of "stock" steel, and to this end was assisted by Capt. Goodearl, who communicated with various steel warehouses in the Middle West in order to locate "stock" steel for this work. Capt. Goodearl explained to W. D. Truman, contracting engineer of claimant company, the necessity of securing "stock" steel from the immediate vicinity of claimant company's plant, in order to relieve congestion and facilitate transportation problems.

7. Under these instructions claimant immediately purchased "stock" steel from such available supply as found by the Government and by claimant, shipped to San Antonio what was in proper condition for shipment, and held the balance awaiting receipt of mill material with which the "stock" steel was to be interfabricated. The "mill" material was slow in arriving, and so long delayed that it was impossible for claimant to fabricate it with the "stock" steel and make shipments before August 20, 1918, as called for by the order. In addition to this delay, further delay in the work was caused by the fact that the plan to duplicate the Baltimore building was abandoned by the Government, the detail plans promised claimant were not sent it promptly, changes in the fabrication specifications were ordered from time to time, and time was lost in Government inspections that proved unnecessary.

for by the order and has been accepted and paid for. The stock steel was shipped eventually, in combination with the "mill" steel, and has been accepted and paid for to the extent of \$103 per ton. Payment has been refused claimant of the extra \$24 beyond this allowed for stock steel, on the ground that the \$24 was allowed as a bonus for prompt shipment and at any rate this steel under the terms of the order was to be shipped "on ance," which was not done, that by no construction of the order can the time for shipment be considered as later than August 20, and that, as all shipments were not made before that date, claimant has not carried out its contract.

9. The claim is for the extra \$24 per ton on "stock" steel tonnage eventually shipped and accepted by the Government.

10. It appears that about 10 tons of the "stock" steel in question was delayed in shipment because it did not pass inspection and required refabrication to bring it up to specifications.

#### DECISION.

1. A careful consideration of the evidence in this case satisfies us that the requisition order of July 1, 1918, is not to be considered as conclusively defining the obligations, or fully expressing the rights, of the parties. The evidence shows clearly that the order was not issued as a completed contract, but rather as an authority to proceed in accordance with an agreement, of which request for bids the proposal, the oral negotiations, and the order are properly to be regarded as evidence. The terms of the order are sufficiently wanting in definiteness to warrant the admission of testimony by way of definition of the terms and to show what the real agreement was.

2. This agreement was that claimant should deliver steel parts, fabricated partly from mill shapes alone and partly from a combination of mill and stock shapes, that it was to use stock shapes to as large an extent as possible, to use mill shapes made only by the Bethlehem Steel Co., and was to deliver the output in a form ready for erecting in a building, the plans of which were at this time considered definitely laid out. In return for this claimant was to receive \$103 per ton for the product that involved only mill shapes and \$127 per ton for the product involving both types of shapes, the extra \$24 being intended to cover the extra cost to claimant of providing the stock shapes entering into the combination. In view of the fact that by far the largest part of the product was to be the result of such combination, that this combination work could not be done without the mill shapes, and that both sides understood this from the beginning, the reasonable interpretation of the whole understanding, as respects time of shipment, is that claimant was



to collect what stock steel it could from its own and adjacent warehouses and ship as soon as possible what did not require fabrication or what could be fabricated and shipped promptly, the balance to be shipped as soon after receipt of mill shapes as was compatible with reasonable fabricating shop practice in carrying out the purpose of the order, which both sides estimated could be done by August 20 if the mill shapes arrived in good season. This interpretation of the evidence conforms to the testimony as to what good shop practice called for and to Capt. Goodearl's testimony as to what he was trying to express when he talked with Mr. Truman, and what he meant by the language of the order, which was prepared by him, and establishes an express agreement within the terms of the act of March 2, 1919, reached on June 28, 1918.

3. This agreement the claimant has carried out, with the exception noted below. Claimant did make some shipments of "stock" steel almost immediately. As to the delays, with the one exception stated below, they were not attributable to claimant's fault, but were due either to the delays in receipt of mill shapes, for which it was not to blame, or to the action of the Government in constantly ordering changes in plans and specifications, which claimant seems to have been justified in obeying. The \$24 a ton extra on "stock" steel was not a bonus for prompt delivery, but was to be a reimbursement for actual expenditures and has no relation to the time of delivery. Nor does it apply only to steel from claimant's own stock. Such a limitation would have made compliance with the order impossible at the prices quoted and accepted, and was never intended.

4. Claimant, therefore, having delivered the stock steel in accordance with its real agreement, is entitled to be paid the order price of \$127 per ton therefor, less such sums as may already have been paid to it on account.

5. The delivery of 10 tons of the "stock" steel was delayed because it did not pass inspection and required refabrication to bring it up to specifications. The delay was clearly the fault of claimant, but nevertheless the Government accepted the steel and thereby waived its right to finally reject it. As it does not appear that the Government suffered damages because of this delay, claimant should receive the same compensation with respect to this 10 tons as it is entitled to for the rest of the "stock" steel.

#### DISPOSITION.

1. This Board will issue its certificate C and document setting forth the nature, terms, and conditions of the agreement in question and transmit the same to the Claims Board, Construction Division, for appropriate action in accordance with this opinion.

Col. Delafield and Mr. Baggarly concurring.

JUNE 24, 1920.

Case No. 1732.

*In re* CLAIM OF A. MENDELSON & BRO. UNIFORM CO. (INC.).

1. **LABOR DISPUTES, INCREASED PRICE ON ACCOUNT OF.**—Where a claimant had a contract for the manufacture of trousers for the Government at 65 cents per pair, which contract contained the usual labor-dispute clause, and prior to the beginning of production thereunder claimant advised the Government that, owing to demands of a labor union for an increase in wages based on a 75-cent per garment price, it could not produce the garments for the contract price, and the Acting Quartermaster General wrote claimant that the contract price had been changed in the contracts to a 75-cent maximum and that a copy of such modification had been forwarded to claimant, and claimant, relying thereon, increased its wages and completed its contract. Held, that the letter of the Acting Quartermaster General was sufficient authority for claimant to increase the wages of its employees, and that there was substantial compliance with the labor-disputes clause, entitling claimant to the increased unit price.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$5,000 based upon a proxy-signed contract. The claim is for additional cost in the manufacture of trousers on account of increased labor costs. Held, on rehearing, by direction of the Secretary of War, that claimant is entitled to the relief sought.

Maj. Blackburn writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case is presented under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$5,000 by reason of an agreement alleged to have been entered into between the claimant and the United States on or about July 9, 1918, for the manufacture of 50,000 pairs of woolen trousers at a unit price of 65 cents per garment. In a former decision by this Board relief was denied claimant, whereupon it took an appeal to the Secretary of War from the decision, and the claim has been returned by the Secretary of War for further consideration and proceedings, upon the following recommendation:

“It is accordingly recommended that this claim be returned to the Board of Contract Adjustment with instructions to determine whether the rate of compensation which was paid pursuant to the

would otherwise have been commenced; an agreement to pay increased compensation in accordance with the Acting Quartermaster General's letter of August 31, 1918, to be established in case the above question is answered in the affirmative; otherwise the claimant to be denied relief.

"(Signed)  
"(Signed)

R. C. GOODALE,  
E. HENRY LACOMBE,  
"Special Advisers."

The case was further heard by this Board on May 26, 1920.

2. The circumstances out of which the claim arises are as follows: Claimant entered into a contract, No. 4433-N, with the United States for the manufacture of 50,000 pairs of woolen trousers at 65 cents per pair, all materials to be furnished by the Government. This contract bears date July 9, 1918, and is signed by claimant and by "Alexander R. Piper, colonel, Quartermaster Corps, Nat. Army. By: John R. Holt, captain, Q. M. R. C.," and is therefore a proxy-signed contract. Claimant made no bid for the work, and was first notified by letter of the award, which was followed in a short time by the contract.

3. The contract contains, among other things, the following provisions:

"11. *Labor disputes.*—In the event that labor disputes shall arise directly affecting the performance of this contract, and causing or likely to cause any delay in making the deliveries upon the date or dates specified, the contractor shall, but only when requested to do so by the Quartermaster General, address a written statement thereof to the Quartermaster General for transmission to the Secretary of War, accompanied by such information and access to information within the control of the contractor as the Quartermaster General shall require, and the Secretary of War may thereupon settle or cause to be settled such disputes, and the contractor agrees to accede to and comply with all the terms of such settlement. If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War may in his discretion direct that a fair and just addition to the contract price be made therefor, but if such settlement reduces such labor costs to the contractor, a fair and just deduction shall be made from the contract price. No claim for addition or deduction shall be made unless the same has been ordered in writing by the Secretary of War. Compliance by the contractor with the provisions of this section shall be of the essence of this contract.

\* \* \* \* \*

"18. *Remedies for breach, liquidated damages.*—Whereas the interests of the Government demand that supplies be secured not only from the contractor, but also from other manufacturers who are producing supplies under other contracts; and since the problem of

other contracts; and since upon the output and efficiency of the workers in the factories furnishing supplies to the Government depends in the last analysis the efficiency of the national defense; and whereas experience during the existing war has been that with long hours, poor sanitary conditions and low wages, ill health would increase among the workers and the output would decline; and whereas these facts create an emergency which it is to the highest interest of the Government to remedy; and whereas part of the price for the articles under this contract is paid in consideration of the maintenance by the contractor of the proper wage \* \* \* it is agreed \* \* \* that breach of any of the conditions herein provided fixing hours, wages, and setting standards for the employment of labor under this contract \* \* \* are of the essence of this contract. \* \* \*

\* \* \* \* \*

"21. *Determination of Secretary of War or Quartermaster General final.*—Every decision or determination made under this contract by the Secretary of War or by the Quartermaster General (exclusive of decisions or determinations by the contracting officer) shall be final and binding upon the parties hereto unless otherwise stated herein."

4. The contractor had tools and equipment already set up and ready for production at the time of signing the contract, and after the contract was signed the contractor executed the required bond, but owing to the failure of the Government to supply sufficient material, production was not actually started until about the latter part of August, 1918. Upon receiving from the Government the material for the contract, claimant endeavored to proceed to production under the piece-work wage scale basis on a price of 65 cents per garment to be paid by the United States. About the time of or shortly after the execution of this contract the United States increased the standard price for the manufacture of woolen trousers from 65 cents to 75 cents per pair, and at the same time approved an increase in wages equivalent to 10 cents per garment. When claimant undertook to proceed to manufacture the trousers it was confronted with the proposition of its employees refusing to undertake the work on the basis of the wage scale contemplated at the time of making the contract, and demanding payment on a basis which would increase the cost of the work about 10 cents a garment.

5. On August 30, 1918, the claimant addressed a letter to the Quartermaster General's office, New York City, as follows:

"Pursuant to our contract #4433-N for 50,000 trousers, wish to inform you that we can not make them successfully, because we are only receiving 65¢ per pair and the Amalgamated Clothing Workers' Union, who are furnishing our factory with employes, have set the price for operators based on the higher or 75¢ price.

"We therefore ask you to grant us the higher or 75¢ price so that we may proceed with our contract and be able to pay our workers the prevailing rate.

"Awaiting an early reply.

"Yours, very truly."

In response to the above letter claimant received the following, dated August 31, 1918:

"From: Acting Quartermaster General.

"To: A. Mendelson & Bro. Uniform Co., Inc., 121 W. 19th St., New York City.

"Subject: Contract #4433-N, 50,000 wool trousers.

"1. In reply to your letter of August 30th, we have changed all contracts written '65¢' to read '75,' maximum, subject to revision.

"2. This modification has already been sent through on your contract.

"By authority of the Acting Quartermaster General.

"MANUFACTURING BRANCH,

"By H. L. WELLS,

"Acting Chief, Clothing Section."

After receiving the above letter from the Acting Quartermaster General, Manufacturing Branch, and relying upon same, claimant increased the proposed rate of pay of its operatives, and the contract was fully completed at such an increase of wage scale, to wit, 10 cents per garment.

6. Payment to claimant for the manufacture of garments according to the increased rate named in the foregoing letter was recommended under date of January 30, 1919, by the zone supply officer, New York City, but payment at the increased rate was refused.

7. Upon the former hearing the Board of Contract Adjustment denied the claim on the ground that the agreement to pay increased compensation was without consideration and was disadvantageous to the Government. The Board further held that claimant, in order to protect its interest, should have proceeded under the labor-dispute clauses in the contract and set out above.

8. The rate of wages prevailing in claimant's establishment on the date of the contract, July 9, 1918, and also at the time of receiving material for the manufacture of trousers, and at the time when the dispute arose between claimant and its employees over the wage rate for the performance of this contract, but for which the contract would have otherwise been commenced, was 10 cents per garment less than the increased rate authorized by the United States subsequent to the making of the contract. The claim as now presented is for the difference between the contract price of 65 cents per garment and the increased price authorized by the Government of 75 cents per garment.

1. Unquestionably the labor dispute which arose in the establishment of claimant when it was prepared to begin production threatened to cause delay in deliveries of the manufactured garments. Claimant, by taking the question of the dispute up orally with Mr. Wells, acting chief of the clothing section, and at his suggestion following the matter up with the letter of August 30, 1918, brought itself fairly within the intent and meaning of the labor-dispute clauses of the contract. Under the facts as developed in the instant case, and as applicable thereto, a fair and reasonable interpretation of the labor-dispute clauses in the contract would seem to be that the contractor, in adjusting a labor dispute arising before production is actually begun under the contract, is required to pay wages for labor higher than those prevailing at the establishment of claimant at the time when the performance of the contract would have been commenced but for the dispute, such increase must be considered as fulfilling the conditions under which a fair and just addition to the contract price is authorized to be made.

The rate of wages which claimant was compelled to and did pay its employees in order to complete performance of its contract being 10 cents per garment in excess of the rate of wages prevailing in the plant of claimant at the time of executing the contract and also at the time when the labor dispute arose, and but for which performance of the contract would otherwise have been commenced, was sufficient to warrant the Acting Quartermaster General in increasing the original contract price from 65 cents to 75 cents per garment, and the letter of August 31, 1918, from the Acting Quartermaster General to claimant was sufficient authority for it to increase the scale of wages of its employees 10 cents per garment in the performance of the contract, which it did. It follows that claimant is entitled to the relief prayed for.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Mr. Marcum concurring.



JUNE 24, 1920.

Case No. 2209.

*In re* CLAIM OF CHAS. BAKER CO. (INC.).

1. **INSURANCE.**—Where claimant's suspended contract provided that claimant should insure Government-owned materials at its own expense "for a reasonable time" claimant is entitled to be reimbursed the cost of insurance for the period beginning a reasonable time after suspension of the contract.
2. **EXTRA WORK.**—Where claimant's formal contract for the manufacture of trousers contained no provision for serging, but Government agents required claimant to serge most of the trousers, there is an implied agreement within the meaning of the act of March 2, 1919, whereby the Government is obligated to pay for such serging.
3. **CLAIM AND DECISION.**—Claim for \$17,385.74, subsequently reduced to \$10,044.52, arising in part under G. O. 103 and in part under the act of March 2, 1919. The claim related to the manufacture of wool trousers. Held, claimant is entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under G. O. 103, War Department, 1918. The claim is presented in affidavit form, and comes to this Board on appeal from the Zone Board of Review, Boston, Mass. A consideration of the record discloses that the claim is based upon two agreements, one arising under the act of March 2, 1919, and the other embodied in a formal contract. Disposition of the claim, therefore, requires a consideration of the different items from both points of view.

A hearing was held in the case on February 16, 1920, but this hearing was continued in order to enable claimant to prepare its case and present further evidence. On June 16, 1920, claimant, through its attorneys, notified this Board that it was willing that the claim be decided upon the record as it stands at present.

STATEMENT OF FACTS.

On July 29, 1918, claimant entered into a formally executed contract, No. 4993-B, with A. W. Yates, colonel, Quartermaster Corps, United States Army, for the manufacture and delivery of approximately 50,000 pairs of wool trousers, at 75 cents per garment. Under the contract the Government was to furnish necessary raw materials, including O. D. melton, the cloth from which the trousers were to be made.

and deliver articles in process of manufacture at the time of suspension. The total number of garments delivered is approximately 39,000.

Claimant originally presented this claim to the zone supply officer, Boston, Mass., and asked reimbursement in the amount of \$17,385.74, which amount, it is alleged, represents the total loss sustained by claimant in connection with the contract. The claim was denied by the zone supply officer, but it appears that that officer was willing to adjust the contract under the standard allowances of the C. and E. Division, Quartermaster Corps. Claimant refused to negotiate for settlement on this basis, and at the suggestion of the zone supply officer appealed to the Board of Contract Adjustment. By a recent undated amended petition claimant has reduced its claim to \$10,044.52.

The claim as amended among either items contains the following:

"Insurance: The item of insurance is for insurance paid by claimant after the cancellation of contract on Government material left in his charge and control, and amounts to \$1,678.68."

Serging: The claimant was required to serve the pantaloons, although contract did not provide for serging. He, therefore, claims:

"Serging 35,000 pairs at 4 cents per pair, or \$1,400."

The Government did not furnish Melton cloth in the amount required by the contract, but furnished several kinds of cloth, including Melton. After claimant had manufactured and delivered 4,000 or 5,000 garments from these materials, Government inspectors notified claimant that in the future all garments, no matter from what material made, would have to be serged else they would be rejected. In accordance with these instructions claimant serged the remainder of the garments delivered to the Government. Claimant alleges that it was told by various officers and inspectors that it would be paid for this serging.

Article VI of the contract reads as follows:

"6. Storage and insurance: The contractor will, when requested by the contracting officer, store for a reasonable time a reasonable quantity of accepted articles and exercise reasonable care to prevent loss or damage thereto or theft thereof, and will insure same and all material paid for or furnished by the Government under this contract against fire and water damage, in a company and under a policy satisfactory to the contracting officer, all at the risk and expense of the contractor."

## DECISION.

1. In our opinion, claimant is entitled to an adjustment under supply circular 111 of the items of its claim arising both out of its suspended contract No. 4993-B, and out of the transactions relating to the serging. Claimant had a valid contract which was suspended, and the claim is not one to which the unit allowances should be applied because claimant has refused to accept adjustment on this basis and because this basis would not afford claimant adequate compensation owing to the character of the items of claim.

2. In reaching this adjustment under supply circular 111 the Claims Board will consider all items except the serging as coming within G. O. 103, and will adjust the insurance items in accordance with paragraph 3 below of this decision.

3. As to insurance, under Article VI of the contract claimant was required to insure at its own expense Government-owned materials "for a reasonable time." Since this article does not specify or limit the extent to which the Government might require insurance, it is a reasonable interpretation to say that the article requires insurance even in case of suspension of the contract and for a reasonable time thereafter. The claimant, therefore, is entitled upon an adjustment of its contract No. 4993-B to an allowance for its actual disbursements for insurance above any sums which it may be able to recover from the insurance company, or companies, by way of return premium, or otherwise, upon the accepted articles and Government-owned materials referred to in Article VI of the contract, for the period beginning a reasonable time after suspension of the contract and ending when the property was removed by the Government as a carrying charge.

4. As to the serging—this item is to be treated as coming within the act of March 2, 1919. The evidence shows that the serging was not contemplated in, or covered by, the written contract, but was work the necessity for which developed later as a result of action of the Government itself in furnishing the claimant with other materials than melton, which was the material which claimant had a right to expect—the other materials being of a kind which could not be used without serging. Under these circumstances claimant was ordered to do this extra work by Government agents, whose authority sufficiently appears, and as a matter outside and in addition to its contract obligations. Consequently, the issuance of these instructions and compliance therewith by claimant, gave rise to an implied agreement within the act of March 2, 1919, in accordance with which claimant is entitled to be paid the reasonable value of its services in performing the serging.

1. This Board will issue its certificate C and document setting forth the nature, terms, and conditions of the agreement relating to the serging and transmit the same to the Claims Board, Director of Purchase, for adjustment of the agreement covered by said certificate C.

2. As respects the other items of the claim, the claim papers will be forwarded to the Claims Board, Director of Purchase, for action in accordance with this opinion.

Col. Delafield and Mr. Hope concurring.

Case No. 2431.

*In re* CLAIM OF E. I. DUPONT DE NEMOURS CO.

1. **EXPLOSIVE TESTS — NECESSARY COST — IMPLIED OBLIGATION.**— Where claimant, at the request of the Government, carried on certain tests of explosives at its testing grounds for the benefit of the Government there arose an implied obligation within the purview of the act of March 2, 1919, to reimburse claimant for the necessary costs expended on behalf of the Government in making such tests.
2. **CLAIM AND DECISION.**—This claim for \$5,712.22 arises under the act of March 2, 1919, and is presented upon the theory of an implied obligation to reimburse claimant. Held, claimant is entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$5,712.22 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant contends that it made 89 experimental ballistic tests of explosives and ammunition for the Government at its experimental grounds at Newbridge, Del. The services rendered to the Government in making these tests were not required under any existing contracts which the claimant had with the Government, and they were not the tests of explosives which were required to be made prior to the acceptance of explosives manufactured by the claimant for the Government under existing contracts. Approximately one-half of the tests were made of materials or explosives which had been furnished to the Government by other concerns and the remaining tests were made of explosives which the DuPont Co. had sold to the Government and which had passed the required tests called for in the contracts of sale.

3. It appears from the evidence that in 1917 and 1918 the Government arsenals were unable to make all necessary tests of explosives required by the Ordnance Department, and that from time to time the Ordnance Department requested the claimant company to carry on such tests at its testing grounds at Newbridge, Del.

Early in August, 1917, Capt. (then lieutenant) Earl Gatchell, chief of the ballistic branch, Explosive Section, Inspection Division, Ord-

partment, to cause to be made such experimental tests of ammunition and explosives as were necessary to acquire additional knowledge of the explosives. Acting on these instructions Lieut. Gatchell gave the same instructions to the inspectors at claimant's plant. On or about August 10, 1917, Lieut. Gatchell directed the claimant to make all experimental tests which might be requested by local inspectors.

In January, 1918, Capt. Gilbert N. Huntting (then first lieutenant), of the Loading Section, Procurement Division, Ordnance Department, was authorized by Col. Halstead Lindsay, Chief of the Loading Section, to make contracts for experimental orders. Capt. Huntting had an arrangement with officers of the Inspection and Engineering Division that they might order experimental work prior to securing a contract and that he would later place a contract for the work so ordered. Capt. Huntting told the representatives of the claimant company that they should perform whatever experimental tests that were properly ordered by Government inspectors, and he would later give the claimant a contract to cover the work which was done. No written contract, however, was drawn to provide for payment of the tests included in the present claim.

The claimant's representatives testified that all of the experimental tests, for which claim is now made, were tests of explosives manufactured by the claimant and previously accepted by the Government, or of explosives or ammunition furnished the Government by other concerns. All of these tests were made at the request of the Government officials. It also appears from the evidence that a Government inspector of ordnance was present at the time of the making of each of said tests and received from the claimant, immediately after the tests, a carbon copy of the report of each test. Capt. Gatchell testified that he later received these reports for check and tabulation of the data covering the experimental tests.

4. Lieut. Col. Miles, jr., and Capt. Gatchell each recalled, while a witness in the hearing, certain tests which he had personally directed to be made. Capt. Gatchell also recalled the fact that all the tests, for which claimant now seeks reimbursement, were made and he has now general recollection of receiving the reports thereon from the Army inspectors. In addition to this, there was offered in evidence by the claimant, three letters, dated April 10, 12, and 13, 1918, respectively, written to claimant by Mr. John D. Stevens, inspector of ordnance, at claimant's plant, requesting that certain tests be made and Capt. Gatchell recalled that he personally directed Mr. Stevens to cause some of the tests to be made, which were requested in these letters.



## DECISION.

1. On or about August 10, 1917, Capt. (then Lieut.) Earl Gatchell, Chief of the Ballistic Branch, Explosive Section, Inspection Division, Ordnance Department, requested the claimant company to make such experimental tests of explosives at its proving grounds at Newbridge, Del., as might be requested by Government ordnance inspectors. He also directed the ordnance inspectors to have made necessary experimental tests of explosives. Capt. G. N. Huntting, Loading Section, Procurement Division, upon the authority of his chief of section, informed the claimant's representatives that the Government would later give to the claimant contracts to cover the cost of making such experimental tests as the Government agents requested it to make.

Acting upon these representations and promises, the claimant did make a large number of experimental tests of explosives, aggregating 89 in number, for and on behalf of the Government, pursuant to requests made at various times by Government inspectors and agents. An ordnance inspector was present at the time of making each of these experimental tests, and received from the claimant a report thereof for use of the Government.

2. There arises an obligation on the part of the Government to reimburse the claimant the necessary cost it has expended on behalf of the Government in furnishing the material and performing the services requested by the Government, which the Secretary of War is authorized to adjust under the act of March 2, 1919, which said agreement was continuing during the time the said tests were made.

## DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Capt. Frazer concurring.

JUNE 26, 1920.

Case No. 2060.

*In re* CLAIM OF NEW YORK AIR BRAKE CO.

1. **RENT.**—Where claimant occupied a plant for a period of eight months under an agreement to pay as rent therefor 1 cent for each cartridge case manufactured therein, and claimant's contract was suspended before the expiration of said eight months, but the agreed sum was paid for all cartridge cases manufactured, there is not further liability on the claimant or the Government on account of rent.
2. **AMORTIZATION OR EQUIPMENT.**—Where the claimant provided equipment for and manufactured cartridge cases for the British and French Governments under several contracts, and then with a fully equipped going plant enters into a contract with the United States in which there is no agreement of any kind as to payment for or amortization of the cost of equipment; claimant is not entitled to amortization of the cost of equipment on suspension of the contract.
3. **INTEREST.**—Interest may be allowed on capital invested in indirect materials under Supply Circular No. 19, section C.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$212,957.01 for materials, rent, equipment, labor, and interest on invested capital. Held, claimant entitled to recover for materials, labor and interest; others dismissed.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. On March 6, 1919, the claimant filed a statement of claim with the Rochester Ordnance District Claims Board, in which it claimed the following sums:

Indirect materials.....	\$86,649.21
Rent.....	28,146.00
Labor on inventory and handling Government material.....	1,716.54
Amortization of equipment.....	91,834.77
Labor, unloading material.....	578.38
Manufacturing cases at contract price.....	50,058.00
Total.....	\$258,982.90
Less offer of claimant for indirect material.....	19,726.58
Balance.....	239,256.32

The Rochester Ordnance District Claims Board issued certificate "C" on May 12, 1919, paid the claimant the sum due for the cases

manufactured, and offered the claimant the following sums in settlement:

Indirect materials.....	\$54,405.27	
Rental of plant to Oct. 1.....	6,805.00	
Labor on inventory and handling Government material.....	1,716.54	
Labor, unloading material.....	578.38	
Amortization of machinery.....	54,875.48	
<b>Total.....</b>		<b>\$118,380.67</b>
<b>Deductions:</b>		
Claims of the United States arising out of contract.....	32,736.75	
Allowance for property retained by contractor.....	251.47	
		<b>32,987.22</b>
<b>Balance.....</b>		<b>85,393.45</b>

2. The claimant refused the said offer of settlement and the claim was sent to the Board of Contract Adjustment on appeal. The claimant revised its claim as follows:

1. Indirect materials .....	\$74,946.28	
2. Rent .....	28,146.00	
3. Rent, June 1, 1919, to June 1, 1920, \$45,000.....	39,044.00	
4. Labor on inventory.....	1,716.54	
5. Unamortized equipment .....	82,256.69	
6. Labor unloading .....	578.38	
7. Interest Jan. 30, 1919, to June 1, 1920.....	5,995.70	
<b>Total .....</b>		<b>\$232,683.59</b>
Less salvage offer for indirect materials.....		<b>19,726.58</b>
<b>Balance.....</b>		<b>212,957.01</b>

3. The claimant rented the factory plant of the American Krupp Deisel Engine Co., consisting of 17 buildings, at Watertown, N. Y., in August, 1915, installed machinery in said plant, and commenced the manufacture of cartridge cases for the British Government. The claimant states that the cost of said machinery was approximately \$450,000. Thereafter it manufactured cartridge cases for both the British Government and the French Government. After the United States entered the war the claimant obtained contracts from the United States Government for cartridge cases.

4. Between June 19 and June 28, 1918, the claimant's vice president, William N. Shaw, and Capt. L. S. Gordon, representing the Government, discussed the terms of an additional contract for the manufacture of cartridge cases. On June 28, 1918, the claimant wrote Capt. L. S. Gordon, in part, as follows:

"Referring to our bid of June 19, we hereby confirm telephone message of yesterday and would say that we will be prepared to accept 2,000,000 75 m/m cartridge cases, packing boxes and discs to be furnished by the Government, at a price of 27c. f. o. b. our plant, Watertown, New York."

5. In July Capt. Gordon orally informed the claimant that it had been awarded a contract for 1,500,000 cartridge cases by the Government to furnish disks and boxes.

6. On August 24, 1918, W. H. Adams, of the Ordnance Department, wrote the claimant inclosing contract, War Department, for 1,500,000 75 mm. cartridge cases.

7. On September 17, 1918, the claimant wrote the Ordnance Division of the Ordnance Department, returning the contract and explaining, first, that it did not provide that the disks remain the property of the contractor, as agreed in the original contract, and that the disks were too heavy. In the said letter the claimant stated that if the contract was corrected in these two particulars it would be glad to execute the contract. On September 24, 1918, Capt. Gordon wrote the claimant that the Government proposed a contract to provide that the scrap work would remain the property of the contractor, and that the contract was increased in quantity to 3,000,000 cartridge cases, but refused to execute the contract in relation to the weight of the disks.

8. On September 30, 1918, the claimant wrote the Ordnance Department withdrawing its objection to the weight of the disks.

"We note that the contract which we returned to you for correction to read 3,000,000 cartridges cases. \* \* \* formal order."

9. Capt. Gordon testified that a day or two before he informed Mr. Shaw that the said original contract for 1,500,000 cartridge cases would be increased to 3,000,000, the original written contract was never forwarded to the claimant.

10. Suspension notice was sent the claimant on October 1, 1918, advising it to suspend work with the exception of operations as could be completed by January 31, 1919, claimant was paid for 1,500,000 cartridge cases and received payment therefor for the balance of the contract.

11. Louis H. DosPassos, secretary of the American Engine Co., testified that the first lease made of the plant to the claimant was executed on August 4, 1918, instead of providing for a certain monthly sum to be paid to the American Engine Co., provided that it should be paid a certain price per case manufactured by the claimant. Mr. Shaw testified that the lease was made on a unit basis instead of providing for a certain period on a monthly basis, and he stated:

"that the Krupp Company could share in the losses involved in the starting up of a brand new industry with little or no experience."

Thereafter, from time to time, leases were made of the plant to the claimant of the said plant at Watertown

of the claimant were present. William N. Shaw was also a director of the Krupp Co.

12. The said resolutions, which were passed from time to time, provided that the said buildings should be ~~leased~~ to the claimant at the rate of a certain sum for each cartridge case manufactured by the claimant. Finally, on August 21, 1918, the following resolution was adopted by the directors of the Krupp Co.:

*"Resolved, That the offer of the New York Air Brake Company to pay this company one cent for each cartridge case manufactured in its plant under a contract with the United States Government commencing October 1, 1918, for a period of eight months, be and is hereby accepted."*

13. William N. Shaw testified that at the said meeting of directors on August 21, 1918, he stated that the claimant had a contract with the United States Government for 3,000,000 cartridge cases to begin October 1, 1918, the date of the expiration of the prior contract, and that it therefore followed that the claimant was obligated to the American Krupp Deisel Co., for rent to the amount of \$30,000 over the eight months stated in the resolution.

14. William N. Shaw testified that the claimant was advised by Capt. Griffin, of the Rochester Claims Board, not to remove the indirect materials from the said plant, nor the claimant's equipment, until final settlement was made with the Government. It appears the claimant stored a large part of the indirect materials in three rooms in said plant and that the keys to said rooms were in the possession of the Government officials of the Rochester board. From time to time the claimant, after consultations with the Government officials, sold some part of the equipment. It seems a large part of the equipment, for all of which, William N. Shaw states, the claimant paid \$450,000, is still in the said plant. The claimant asks that it be allowed rent not only for the period of eight months alleged to be covered by the said resolution but also to the date of final settlement.

15. The claimant demands amortization of the said equipment. No agreement was made with the claimant to amortize its equipment.

16. James H. McKenna, in charge of the Technical Groups of the Board of Contract Adjustment, testified that he had visited the said plant of the claimant at Watertown, N. Y., and caused an examination to be made of its accounts in relation to the items claimed, and that he has found that the amount claimed for indirect materials now on hand, \$74,946.28, is an accurate statement of the sums expended by the claimant and that, in his opinion, the said indirect materials were materials purchased in the exercise of good judg-

17. Mr. McKenna also testified that the sum of \$1,716.54 was a reasonable sum expended by the claimant for labor in handling, and for storing for a period, the completed cartridge cases under the said agreement, and for assisting the United States Government in making an inventory of the said indirect materials.

18. Mr. McKenna also testified that the sum of \$578.38 claimed for labor in unloading material he has found from the examination of the books to be a reasonable sum.

#### DECISION.

1. We find that on or about September 30, 1918, Capt. L. S. Gordon, representing the United States Government, and William N. Shaw, representing the claimant, entered into an agreement under the terms of which the claimant undertook to manufacture 3,000,000 cartridge cases at 27 cents each, the claimant to retain scrap, and that certificate "C," issued by the Ordnance Department, was properly issued, with the exception that the date the agreement set forth in said certificate should be changed to September 30, 1918.

2. The claimant's revised claim is set forth in paragraph 2 of this decision. Taking up the items therein set forth, we find (item 1) that the loss on the indirect material necessarily kept on hand for the performance of the said agreement, (item 4) the cost of making the inventory and handling cartridge cases, and (item 6) the cost of unloading Government material should all be estimated and allowed the claimant.

3. (Item 2.) The best evidence of the claimant's obligation for rent to its lessor is the resolution above quoted, dated August 21, 1918, which provides that the claimant shall pay its lessor 1 cent for each cartridge case manufactured under the agreement in question. It appears that this sum was paid the lessor. We are unable to find from the evidence any obligation upon the part of the claimant to pay its lessor any further sum. Accordingly the item for rent to June 1, demanded by the claimant, is denied.

4. (Item 5.) The claimant's witness, William N. Shaw, admitted that no agreement in relation to amortization was made at the time the claimant entered into the agreement under consideration. The evidence shows that when the claimant entered into the agreement it had a going plant fully equipped and it undertook the manufacture at a given price. Whether its plant was fully amortized by its British and French contracts and other contracts prior to the agreement under consideration does not appear. We find no obligation on the part of the Government to make an allowance to the claimant of any sum for amortization of its machinery and equipment.



by Capt. Griffin, of the Rochester Ordnance Claims Board, to William N. Shaw that the claimant should not remove its machinery and equipment and indirect materials until its claim had been settled. The claimant knew, or should have known, that it had no claim against the United States Government for amortization of its machinery. We find that if any such statement was made by a member of the Rochester Ordnance District Claims Board, it was without authority and without consideration on the part of the claimant, and therefore does not bind the United States Government.

6. We find that the interest on the capital invested in indirect materials should be estimated in accordance with section C, Supply Circular No. 19, and allowed the claimant.

7. From the amount determined to be due the claimant should be deducted such amount as may be found to be due the United States Government for disks retained by the claimant. The amount which the Rochester board found to be due the United States Government for said disks is set forth in paragraph 1 of the findings of fact.

#### DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Ordnance Department, for appropriate action.

Col. Delafield and Mr. Fowler concurring.

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JUNE 29, 1920.

Case No. 2740.

*In re* CLAIM OF GARFORD MOTOR CO.

1. **INDEPENDENT CONTEMPORANEOUS AGREEMENT.**—A written contract is presumed to contain the entire agreement between the contracting parties and parol evidence is inadmissible to add to, detract from, or vary its terms; but it is also the rule that either of the parties may show, by parol or otherwise, the existence and terms of an independent agreement as to a matter not covered by the written contract.
2. **IDEM.**—Where the proposal submitted by claimant contained a stipulation that all taxes thereafter imposed by Congress should be taken care of or paid by the Government, and this stipulation was omitted from the formal contract, which claimant refused to sign or perform until assured and promised by duly authorized Government officers that the taxes, if imposed, would be taken care of through the medium of a separate agreement, and, relying thereon, claimant executes and performs said contract and taxes are imposed, an implied agreement arose under the act of March 2, 1919, to reimburse claimant for such taxes.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$73,489.20 war taxes. Held, claimant entitled to recover.

Mr. Patterson writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B; also supplemental petition, has been filed for \$73,489.20, that sum being taxes under section 600 of the revenue act of October 3, 1917, on 900 Class "A" chassis, sold and delivered by claimant to the United States.

FINDINGS OF FACT.

1. Claimant is a corporation organized and existing under the laws of the State of Ohio, having its principal office at Lima, Ohio.
2. Under date of May 12, 1917, the Quartermaster Corps, United States Army, caused to be issued and circulated an advertisement inviting proposals for type A (1½ ton) and type B (3 ton) motor-truck chassis as therein specified, bids to be opened June 10, 1917, at the office of the Quartermaster Corps, Chicago, Ill.
3. Pursuant to said advertisement claimant submitted a sealed bid on Quartermaster Corps Form 544 under date of June 10, 1917. This bid contained the following clause:

"The fulfillment of this proposal will be subject to other requirements and demands of the United States Government, and any

special taxes imposed by National or State Governments which will be added to the above prices."

4. On July 25, 1917, the depot quartermaster, Chicago, Ill., wrote and dispatched a letter to claimant, which was duly received by it, the material portions of which are as follows:

"1. Under authority from the quartermaster general in a telegram dated July 16, award is made you in accordance with your proposal to this depot, opened June 10, 1917, under our schedule No. 544, to furnish to the United States the following (bills in triplicate to be sent to this office for payment):

"2. 900 Class 'A' chasses in accordance with Government specifications as modified by exceptions submitted with bid of June 10th, 1917: 36 x 4 demountable tires on front wheels and 36 x 7 demountable tires on rear wheels; rims as per B/P T-101; make of tires to be approved by this office. Price, each, two thousand seven hundred and thirty dollars (\$2,730) net f. o. b. Lima, Ohio. Chasses crated for overseas shipment when required.

"3. When ready for inspection notify this office one week before material is actively in process of manufacture, upon which an inspecting officer will be assigned to your factory.

"4. This equipment is desired for immediate use for the Government for military purposes, and it is requested that immediate delivery be made and completed in December, 1917.

"5. Please acknowledge receipt of this award, which is in addition to all other awards heretofore placed with you, and advise expected date of delivery. You are advised that under act of Congress, precedence may be given by you to this award over all commercial orders already placed with you.

\* \* \* \* \*

"By authority of the depot quartermaster."

5. Gen. C. B. Drake, United States Army, who at the time the above award was made was major and assistant to the quartermaster general, has made affidavit in which he states that after the above award was made he advised B. N. Price, Washington representative of claimant, to have claimant proceed at once "with the purchase of the necessary supplies, parts, and material to manufacture and deliver the 900 class A Garford chasses awarded to said company and to begin work thereon at the earliest possible date, and requested said Price to direct said Garford Motor Truck Co. to proceed with the manufacture of said chasses under its proposal and the award made thereon by said quartermaster general, and not to await the matter of the completion and execution of a formal contract to be based on said proposal and award so made to said company; that at said time the Government required the early completion of the chasses awarded by it to the Garford Motor Truck Co. and desired said company to begin the manufacture thereof and not delay the same until a formal contract could be executed: \* \* \*." Mr. Price testified that he transmitted these instructions by telephone to Mr. E. A. Williams,

6. Immediately after the receipt of the letter of award, the material parts of which are quoted in finding 4, and in compliance with paragraph 4 thereof, and also in compliance with the verbal instructions of Maj. Drake recited in finding 5, claimant started to manufacture chasses in accordance with the terms of the proposal and award. Most of the necessary preparatory expenditures and purchase of machinery and materials necessary for the performance of the contract were made by claimant before the formal contract was executed, the first shipment of trucks being made September 21, 1917.

7. On or about September 24, 1917, a contract, Quartermaster Corps, Form 108, dated July 25, 1917 (not numbered), for 900 class A chasses at a total price of \$2,457,000, was sent to claimant for signature. This contract did not contain the clause included in claimant's bid or proposal relative to the payment by the Government of the taxes referred to in finding 3.

8. The contracting officer named in the contract mentioned in finding 7 was Col. A. D. Kniekern, Quartermaster Corps, who was depot quartermaster at Chicago, Ill. First Lieut. E. C. Ecker was executive officer to the depot quartermaster at Chicago and was charged with the detail of the office, conferring with his superior from time to time and carrying out his instructions.

9. Upon receipt of the formal contract mentioned in finding 7 Mr. Williams, president of claimant company, called Mr. Price, Washington representative of claimant company, over long distance telephone, and instructed him to make an investigation of the cause for the omission of the tax clause from the contract. Mr. Price called on Maj. Drake in an effort to have the tax clause inserted in the contract, but was informed by Maj. Drake that it was impossible to insert an indefinite figure in a Government contract; that Congress had not settled upon a definite amount or rate of war tax; that the contract itself covered all matters involved, as in fact it was considered that the proposal and award were part thereof, so that it was not necessary that the tax clause contained in the proposal be inserted in the contract; and further even if a tax were imposed upon automobiles the same would be paid by the Government and it would, therefore, be all right for claimant company to execute the contract and proceed with the performance thereof. The result of this interview was communicated by Mr. Price to Mr. Williams, and the latter testified that upon consideration of the report the contract was executed and his company proceeded upon the performance thereof.

10. Thereafter Congress enacted a revenue act which became a law on October 3, 1917, and section 600 of which imposed a tax of 3 per cent on automobiles. Claimant manufactured and delivered the motor chasses from time to time, and at various times submitted its invoices therefor to the Chicago depot quartermaster. These invoices included, as a special item, the amount of taxes.

11. Sometime in October, 1917, claimant submitted its invoices to the depot quartermaster, Chicago, Ill., covering 20 trucks shipped to Camp Funston, Kans., in the sum of \$56,238, which amount included the tax of 3 per cent. On or about October 20, 1917, claimant received from the depot quartermaster, Chicago, Ill., a voucher for \$54,600, being the amount of its invoice less the tax of 3 per cent, which had been deducted. Thereupon Mr. E. F. Sayers, assistant president of claimant company, called Lieut. Ecker, in the office of the depot quartermaster, Chicago, Ill., over the long-distance telephone, and called attention to the omission from the vouchers of the item of war tax amounting to \$1,638. Lieut. Ecker directed that claimant resubmit its invoice for the 20 trucks and to submit a separate invoice for the war tax. This was done and both invoices paid.

12. Under date of November 2, 1917, the depot quartermaster, Chicago, wrote and dispatched a letter to claimant as follows:

"You are informed that the following telegram has been received by this office from the office of the Quartermaster General of the Army, dated November 1, 1917:

"Referring your telegram October twenty-fourth, signed Ecker, and reply of this office twenty-fifth, where contracts for motor vehicles stipulate the tax imposed by section six hundred of act of October third, nineteen seventeen, shall be paid by Government, you are authorized to do so; otherwise to be paid by contractors."

"2. From the foregoing you will understand that this office is without authority to pay war tax on any vehicles furnished by you under your contract with this depot, dated July 25, 1917, and any taxes that may have been paid to you on previous accounts will have to be returned by you. Please advise whether you desire to remit the same by check or whether you prefer that the amounts shall be deducted from accounts to become due you for vehicles furnished under this contract.

"By authority of the Depot Quartermaster."

13. On receipt of the letter quoted in Finding 12, E. F. Sayers, assistant to the president of claimant company, proceeded to Chicago, Ill., and had an interview with Lieut. Ecker on November 5, 1917, with respect to the payment of this war tax. On that occasion Lieut. Ecker advised Mr. Sayers that his office had been authorized by telegram from Washington to pay the 3 per cent war tax when the same was covered in contractor's proposal. This telegram was shown to Mr. Sayers by Lieut. Ecker.

It included the tax in its invoices in each instance and the invoices including the tax were paid.

15. Under date of July 29, 1919, T. W. Bramhall, first lieutenant, Ordnance Department, United States Army, wrote to claimant as follows:

"1. You are advised that the Comptroller of the Treasury has disallowed all payments to you to cover war tax paid under your contract dated July 25, 1917. A schedule of vouchers and amounts as paid, together with the auditor's advice of disallowance, is attached hereto.

"2. Inasmuch as your contract makes no provision for these payments and from the further fact that the matter has been passed upon by the Comptroller of the Treasury, who is the highest accounting official, and the same disallowed, you are requested to send your check payable to the Treasurer of the United States in the sum of \$69,294.77 to cover the amount erroneously paid to you.

"By authority of the Director of Finance."

16. Under date of December 18, 1919, Lieut. Col. D. W. Arnold, retired, wrote to claimant as follows:

"1. Reference enclosed extract copy of a letter from the Comptroller of the U. S. Treasury, which is self-explanatory; also a copy of your contract and a tabulated statement of vouchers paid to your firm.

"2. You are advised that this office paid your firm this war tax under instructions from the Quartermaster General and when these payments came to the comptroller for audit he refused to pass them to my credit, as shown in his letter herewith.

"3. You are therefore requested to refund this amount of overpayment, viz, \$71,111.87, thus clearing these vouchers with the U. S. Treasury; furthermore, you are advised that the decision of the comptroller is conclusive upon the department and necessarily overrules the office of the Quartermaster General.

#### DECISION.

1. It is, of course, an elementary proposition that a written contract is presumed to contain the entire agreement between the contracting parties and to express the full result of their negotiations and deliberations. For this reason the formal rule has been enunciated that parol contemporaneous evidence is inadmissible to add to, detract from, or vary its terms. But it is equally well established that this rule does not preclude either of the parties from showing by parol or otherwise the existence and terms of an independent agreement as to a matter not fully covered by the writing. (See *Burke v. Dulaney*, 153 U. S., 228, 237; citing and quoting from *Benton v. Martin*, 52 N. Y., 570, 574.)



2. The evidence in this case establishes such a contemporaneous supplementary agreement. Claimant's proposal, in accordance with which the contract was awarded it, distinctly stipulated that its bid was exclusive of any tax that might thereafter be imposed by Congress upon the contract or the articles and that any such tax was to be taken care of by the Government. It was vigilant in scrutinizing the formal contract when tendered it for signature and promptly brought to the attention of the contracting authorities the fact that this point had not been covered. The reason assigned by the latter for omitting from the contract this clause, which had been agreed upon as part of the bargain, seems unsatisfactory, but Gen. Drake absolutely confirms the statements of both Mr. Price and Mr. Williams that a definite promise was made that the Government would assume the tax if imposed. This promise was made to induce claimant to execute the contract as prepared, and its execution by the latter was a good and effectual consideration for it.

3. It also appears that a further attempt to impose this tax upon the contractor was made upon the occasion of the first delivery of chassis. Claimant having renewed its protest, the disbursing officer again yielded and paid the tax as agreed.

4. It is thought that this case falls within the rule laid down by this Board in the matter of Fred T. Ley & Co., No. 760, Volume II, Part I, page 145, and in the matter of Locomobile Co. of America, No. 150-C-2502. All of the elements of an agreement within the purview of the act of March 2, 1919, have been established and claimant should have the relief petitioned for.

#### DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, March 3, 1919.

Col. Delafield and Capt. Morgan concurring.

JUNE 29, 1920.

**Case No. 2800.**

***In re* CLAIM OF THE NEW YORK & PENNSYLVANIA RAILROAD CO.**

1. **POSSIBLE LOSSES.**—Under the act of March 2, 1919, a claimant is not entitled to be reimbursed speculative or possible losses.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement to reimburse claimant for such losses as it suffered in continuing to operate a certain part of its railroad at the request of the Government. By its decision of May 5, 1920, this Board held that claimant was entitled to relief under the act. It now holds that while claimant is entitled to reimbursement for losses suffered in operation of the railroad in question it is not entitled to compensation on account of not being able to carry out its alleged contract to sell its rails and other equipment at an advantageous price, nor for alleged extra expense incurred in dismantling its tracks by reason of the advent of stormy weather. For the facts, see the syllabus of the prior decision of the Board.

Mr. Eaton writing the opinion of the Board.

**DECISION.**

1. Reconsideration of the decision of this Board dated May 5, 1920, was requested by the special member of the War Department Claims Board assigned to the Air Service. Another hearing was granted the claimant before this Board on June 17, 1920, and the case was argued by counsel.

2. After an examination of the record and of the transcript of evidence and the affidavits of Messrs. John D. Ryan and Henry Lockhart, jr., we have reached the conclusion that our earlier decision should be reconsidered and a new decision rendered.

3. It appears that the claimant was given permission by the State of New York to discontinue operations on that part of the railroad which lay within the boundaries of New York; that a petition had been filed in the Court of Common Pleas of Potter County, Pa., for leave to discontinue operations in Pennsylvania; that the petition came up for a hearing before the court on May 18, 1918; and that decision was reserved on account of a telegram from the general counsel of the Railroad Administration who acted at the request of the Bureau of Aircraft Production.

4. It further appears that on May 21, 1918, Mr. Howard Cobb, treasurer of the claimant company, proceeded to Washington and interviewed Mr. Henry Lockhart, jr., who was in charge of the materials section of the Bureau of Aircraft Production. Mr. Lockhart told Mr. Cobb that the product of the chemical companies along the line of the railroad was so essential to the Government that he must continue to operate the railroad and that under no circumstances would the Government allow the operation of the railroad to be discontinued.

5. In consequence of the requests or directions of Mr. Lockhart, the claimant continued to operate its railroad and refrained from pressing its petition in the Pennsylvania court. On November 12, 1918, Mr. W. C. Potter, Assistant Director of Aircraft Production, wired the Pennsylvania court, withdrawing opposition to the claimant's petition.

6. The claimant having continued to operate its railroad and having refrained from pressing its petition in Pennsylvania at the request or direction of the Government, it follows that an implied agreement was entered into by which the Government undertook to reimburse the claimant for such losses as it suffered in continuing to operate the railroad. The claimant is not entitled to compensation on account of not being able to carry out its alleged contract to sell its rails, ties, and equipment at an advantageous price. It would be carrying the obligations of the United States too far to hold it responsible for possible losses to the claimant on account of its not having been able to put itself in a position where it could make delivery of its rails, ties, and equipment to a purchaser, nor is the Government responsible for losses alleged to have been caused by the advent of stormy weather, by reason of which it was said that the dismantling of the railroad became more expensive.

#### DISPOSITION.

The certificate of this Board, Form C, dated May 5, 1920, and the document setting forth the nature, terms, and conditions of the agreement, approved and certified on the same date, will be revoked and a new certificate, Form C, and a new document will be executed in accordance with this decision, and the new certificate and document will be transmitted to the Claims Board, Air Service, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Tanner concurring.

JUNE 30, 1920.

Case No. 2514.

*In re* CLAIM OF PENNSYLVANIA RAILROAD, EASTERN LINES, FEDERAL ADMINISTRATION, AND PENNSYLVANIA RAILROAD CO.

1. RENTAL OF PASSENGER CARS.—Under the act of March 2, 1919, the Government is obligated to pay a stipulated rental for the use of claimant's passenger cars by the Ordnance Department for hauling employees at one of its plants.
2. CLAIM AND DECISION.—Claim under the act of March 2, 1919, for \$716, based upon an informal written agreement in relation to the rental of claimant's passenger equipment. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, as amended, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$716 by reason of an agreement alleged to have been entered into by the claimant and the United States.

2. The claim is for the use of passenger equipment in transporting employees of the T. A. Gillespie Loading Co. as agents of the United States Ordnance Department, to and from the plant of the Gillespie Co., located at Morgan, N. J., for the period July 18, 1918, to January 31, 1919, inclusive, and the amount claimed represents a rental charge for 1,432 cars, at 50 cents per car, while those cars were off the claimant company's tracks and were on the tracks at the Gillespie Co. plant.

3. The evidence shows that on July 9, 1918, a conference was held in the office of Charles R. Capps, traffic assistant to the regional director, Philadelphia, Pa., at which conference were present Mr. Capps and other officers of the claimant company and P. J. Clark, representing the Housing Commission, United States Department of Labor.

4. The evidence further shows that at that conference the matter of train facilities in connection with the movement of employees of munitions plants on the New York & Long Branch Railroad from Avon north, including Asbury Park, North Asbury Park, and

Long Branch to Amboy to relieve "the Government of building houses," was discussed. A memorandum purporting to be a transcript of what transpired at this conference was submitted in evidence, which states, under the name of F. A. Smöck, master mechanic of the claimant company, "Nothing, however, was definitely arranged except for one train when asked for by Mr. Clark. This train to be provided by the Pennsylvania Railroad."

5. A letter dated July 26, 1918, was received in evidence, which purports to be a communication addressed to Mr. E. A. Yates, vice president and general manager of the "T. A. Gillespie Loading Co., agent, Ordnance Department," from the general superintendent of the claimant company referring to the workmen's trains then being operated between Asbury Park and Morgan and referring to a Yates letter of July 25 in which he (Yates) is stated to have advised that the train should be discontinued for a month or six weeks. The letter of the claimant company of the 26th further states: "We will deliver the coaches of this train to your yard, you to handle the coaches from and to your various units and return the cars to your yard coupled up ready to leave that point at 5.30 p. m. \* \* \* It will also be necessary to make a charge of 50 cents per day per car for the use of our cars in this service."

6. A letter of July 27, 1918, was also received in evidence, addressed to Mr. R. V. Massey, general superintendent of the claimant company, from the Gillespie Co., signed "United States of America Ordnance Department, T. A. Gillespie Loading Co., agent, by E. A. Yates, vice president and general manager," acknowledging receipt of the letter of July 26 and stating in part, "The conditions stated in your letter with respect to our responsibility for the coaches while on our property and with respect to the per diem charges are entirely satisfactory to us."

7. The claimant was unable to produce the Yates letter of July 25 referred to in the letter of July 26, 1918.

#### DECISION.

1. A review of the evidence shows an agreement was entered into on July 26, 1918, between the claimant company, represented by R. V. Massey, general superintendent, and the Secretary of War, acting through E. A. Yates, vice president and general manager of the T. A. Gillespie Loading Co., agent, United States of America Ordnance Department, covering a per diem charge of 50 cents per day per coach while transporting the employees of the T. A. Gillespie Co., agent, Ordnance Department, to and from the plant of that company, located at Morgan, N. J.

1. THIS BOARD WILL MAKE AND TRANSMIT A STATEMENT OF THE NATURE, terms, and conditions of the agreement and certificate "C" to the Claims Board, Ordnance Section, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Mr. McCandless and Mr. Price concurring.



JUNE 30, 1920.

Case No. 2659.

*In re* CLAIM OF A. R. MOSLER CO.

1. **FIXED-PRICE CONTRACT—AMORTIZATION.**—Where the claimant had a contract for 1,500,000 spark plugs which provided that the price to be paid therefor should be fixed after the manufacture and delivery of the first 300,000, that claimant should be entitled to cost and 15 per cent profit, and the contract provided for cancellation and amortization of cost of facilities, this was a fixed-price contract, entitling the claimant to amortization, and not full reimbursement as under a cost-plus contract.
2. **TERMINATION CLAUSE.**—Allowances made on suspended formal contracts, which contain a termination clause, are governed by said clause and no allowance can be made unless provided for therein.
3. **INTEREST.**—Where the claimant borrowed money from the War Credits Board and paid interest on account thereof such interest is not a proper claim under the suspended contract herein, because its payment was not provided for in the termination clause nor otherwise contracted for.
4. **LEGAL AND AUDITING EXPENSES.**—Fees paid lawyers and expert accountants to prepare this claim against the Government are not items of cost under the contract and not authorized by the termination clause and can not be allowed.
5. **IGNORANCE OF CANCELLATION CLAUSE.**—The contention of the claimant that it was not advised that the proposed contract would contain a clause authorizing the Government to cancel it under certain conditions is without merit, as it received, read, accepted, and signed the contract and is bound thereby.
6. **CLAIM AND DECISION.**—Claim under G. O. 103 on suspended formal contract for \$275,586.17, facilities, rent, interest, and other expenditures. Held, claimant entitled to recover in part.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This is an appeal from a decision of the Air Service Claims Board, on a claim for \$275,586.17, on a formally executed contract under the following circumstances:

1. The A. R. Mosler Co. was a corporation engaged in the manufacture of spark plugs at Mount Vernon, N. Y., and on June 19, 1918, received the following procurement order from the Bureau of Aircraft Production:

*“Order No. 31199.*

*“Item 1. 10,000 Mosler spark plugs, Liberty type, at \$1.25 each, \$12,500.00. The Bureau of Aircraft Production reserves the right to send cost accountants to your factory to investigate cost.*

*“Contract #4120 will follow.”*

*"Order No. 730586.*

"Item 1. Dated October 10, 1918. 1,500,000 mica spark plugs for Liberty engines, tolerance threaded, according to specifications to be furnished by the Detroit district office, at each, \$-----

"NOTE.—First 300,000 plugs to be paid for on a billing price of \$1.30 each, which is subject to adjustment, and the final price for the entire order to be determined at the time 300,000 plugs are completed. Money advanced for machinery and buildings up to \$75,000, to be repaid by you at the rate of 5 cents per plug.

"Contract #4987 will follow.

"Deliveries to be at the rate of 5,000 per day during November and December, 1918, to be increased to 10,000 per day not later than January 1, 1919."

3. This order, No. 730586, was amended by letter of the Director of Aircraft Production dated October 11, 1918, as follows:

"Reference is made to Order No. 730586, dated October 10, 1918.

"The last sentence in the first footnote referring to money advanced for machinery in buildings up to seventy-five thousand dollars (\$75,000.00) is amended to read as follows:

"The Bureau of Aircraft Production will endeavor to obtain from the War Credits Board an advance of money for machinery and equipment in an amount of seventy-five thousand dollars (\$75,000.00) under such terms as may be agreed between yourselves and the War Credits Board."

4. This order, No. 730586, was again amended by the Director of Aircraft Production under date of October 16, 1918, as follows:

"Order #730586 is amended to provide that the unit price per plug to be agreed upon later shall be based upon the cost of production experienced during the production of the first 300,000 plugs, plus fifteen per cent (15%) profit. The cost of production shall be determined by the Government accountants.

"In case increases or decreases are made in the price of labor or material during the period of the contract after the unit price has been agreed upon, an adjustment in price will be made so as to absorb such increase or decrease."

5. Order No. 31199, dated June 18, 1918, was confirmed by contract No. 4120, Form 13, Type B, dated June 21, 1918, contract being formally executed by both claimant and the United States Government. Order No. 730586, as amended by letters of October 11 and 16, was confirmed by contract No. 4987 bearing date of October 10, 1918. Letter dated October 9, 1918, second paragraph thereof, informed claimant as follows:

"Inasmuch as order No. 730586 which is being issued to your company for 1,500,000 spark plugs covers the requirements of order No. 31199, you are advised that same is hereby canceled."

6. Therefore the only claim now presented to this Board is that arising under the formal contract of October 10, 1918, which was finally canceled and under which the claimant made up and delivered only 200,000 spark plugs of the 1,500,000 provided for under the formal contract of October 10, 1918.

7. On November 29, 1918, the contract in question was limited to 300,000 spark plugs by the following telegram:

"Limit production of order seven three naught five eight six to total of three hundred thousand spark plugs. Incur no expense beyond that amount. Acknowledge receipt."

8. The above telegram was confirmed by letter dated December 3, 1918, signed by A. C. Downey, lieutenant colonel, A. S. A. P., and A. R. Mosler & Co. acknowledged receipt of the said telegram and letter by their letter of December 4, 1918.

9. On February 12, 1919, the contract was further suspended and limited to 200,000 spark plugs by the following telegram:

"Limit production under order seven three naught five eight six covering one million five hundred thousand spark plugs to two hundred thousand. Incur no further expense with any quantity above this amount. Acknowledge receipt. This amends our telegram of November twenty-ninth Aircraft procurement. Schnacke."

Contract No. 4987, dated October 10, 1918, contained a cancellation clause under article 12, as follows:

"If, in the opinion of the chief of the bureau, the public interest shall so require, this contract may be terminated by the United States by ten (10) days' notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of ten (10) days after the giving of such notice, and shall be without prejudice to any claims which the United States may have against the contractor under this contract. After the receipt of such notice the contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the contracting officer, but inspection of the completed articles or work and acceptance thereof by the United States in accordance with the terms of this contract shall continue during such period of ten (10) days as though such notice had not been given.

"In the event of and upon the termination of this contract, prior to the completion, as provided in this section 2, for any reason other than the default of the contractor, the United States shall make payments to and protect the contractor as follows:

"(a) The United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective.

"(b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures

properly apportionable to the articles or work, the delivery or performance of which is so terminated, plus ten per cent (10%) of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.

"(c) The United States shall protect the contractor against such proportion of the contractor's outstanding obligations incurred by the contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles or work, the delivery or performance of which is so terminated.

"The facts to be determined under the above subdivisions (b) and (c) shall be determined by agreement between the contractor and the contracting officer, and in the event of their failure to agree shall be determined by three persons—one to be appointed by the contractor, one by the contracting officer, and the third by these two.

"(d) The United States shall also pay to the contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the contractor at its expense for the performance of this contract, an amount to be determined as follows: As soon as conveniently may be done after such termination of this contract, the fair market value of such plant, facilities, and equipment at the time of such termination shall be determined by an appraisement to be made by three appraisers—one to be appointed by the contractor, one by the contracting officer, and the third by these two. The United States shall then pay to the contractor such part of the amount by which the cost to the contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof as shall be fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated; and in determining what amount is so fairly and properly apportionable due regard shall be had to the extent to which this contract shall have been performed and the extent to which the cost of said plant, facilities, and equipment should be regarded as having been absorbed by such performance. The amount so fairly and properly apportionable shall be determined by agreement between the contractor and the contracting officer, if possible, and in the event of their failure to agree shall be determined by three persons—one to be appointed by the contractor, one by the contracting officer, and the third by these two."

It was under the foregoing termination clause that the United States elected to limit the manufacture of spark plugs to 200,000, for which the claimant has been fully reimbursed at the contract price, the claim now presented to this Board being for the sum the claimant alleges is due on account of the termination of the contract. This claim was first presented to the Air Service Claims Board, which under date of April 6, 1920, after full investigation and hear-

ing, rendered a decision by which it allowed the claimant the sum of \$130,944.30, as set out in the following statement:

	Original claim of A. R. Mosler & Co.	Allowed by Air Service Claims Board.
<b>Item 1:</b>		
Direct labor.....	\$63,264.69	\$63,264.69
Direct material.....	75,854.53	73,269.70
Overhead—		
Special tools and gauges.....	17,199.84	16,346.46
Experimental work.....	1,739.52	965.44
Indirect matl. and factory supplies.....	6,136.26	5,940.14
Repairs of tools, mach., etc.....	22,084.17	4,794.22
Plant alteration.....	12,447.19	.....
Depreciation of inc. facilities.....	3,638.83	.....
Indirect factory pay roll.....	20,233.68	20,105.88
General office salaries.....	20,198.27	19,280.33
Administration expenses.....	13,272.91	8,292.91
Depreciation of mach., etc.....	4,336.04	3,612.79
Light, heat, and power.....	3,232.30	2,980.16
Rent, water, taxes, and insurance.....	3,227.83	417.89
Insurance.....	4,542.76	2,252.83
Misc. expenses.....	8,644.47	7,371.98
Packing and packing supplies.....	518.08	518.08
	280,571.37	229,413.50
Less overhead appl. to work in process.....	.....	4,816.13
	280,571.37	224,597.37
15% profit.....	42,085.71	33,689.61
Total.....	322,657.08	258,286.97
Less payments on public vouchers.....	260,000.00	260,000.00
Amount due contractor.....	62,657.08	<sup>1</sup> 1,713.03
<b>Item 2:</b>		
Raw material on hand.....	94,341.55	98,215.24
Allowance 10%.....	9,434.16	9,821.52
Total.....	103,775.71	108,036.76
Less raw material purchased by contractor.....	22,900.00	36,000.00
Amount due contractor.....	80,875.71	72,036.76
<b>Item 3:</b>		
Small tools and hardware on hand.....	1,366.63	1,366.33
Allowance 10%.....	136.66	136.63
Total.....	1,503.29	1,502.96
Less material pur. by contractor.....	.....	450.00
Amount due contractor.....	1,503.29	1,052.96
<b>Item 4:</b>		
Partly finished material on hand.....	33,914.85	34,018.90
Allowance 10%.....	3,391.49	3,401.89
Total.....	37,306.34	37,420.79
Less mat'l purchased by contractor.....	2,000.00	2,000.00
Amount due contractor.....	35,306.34	35,420.79

<sup>1</sup> Minus.

	Original claim of A. R. Mosler & Co.	Allowed by Air Service Claims Board.
Item 5:		
Overhead expenses directly chargeable to uncom- pleted portion of contract—		
Executive and administrative salaries, including cost of preparing costs and taking inventory..	\$12, 291. 22	\$4, 103. 15
Other expenses.....	3, 255. 02	.....
Removing plant back to its original condition, including cost of equipping new bldg.....	10, 400. 00	4, 428. 98
Interest on money invested on raw materials, etc.	4, 500. 00	.....
Repairs of machines.....	1, 000. 00	.....
Interest on money borrowed from War Credits Board.....	4, 444. 98	.....
Total.....	35, 891. 22	8, 532. 13
Allowance 10%.....	3, 589. 12	.....
Amount due contractor.....	39, 480. 34	8, 532. 13
Item 6:		
Commitments to supplies and subcontractors.....	16, 981. 25	14, 923. 03
Less payments made on public vouchers.....	.....	14, 923. 03
Amount due contractor.....	16, 981. 25	.....
Item 7:		
Increased facilities.....	23, 652. 40	27, 199. 30
Plant constr. and alterations.....	.....	4, 644. 07
Total.....	23, 652. 40	31, 843. 37
Less appraised value at termination of contract.....	5, 913. 10	16, 852. 38
Amount due contractor.....	17, 739. 30	14, 990. 99
87% allowed.....	.....	13, 042. 16
Item 8: Damages sustained by reduction of cont. from 300,000 to 200,000 plugs.....	21, 042. 86	.....
Item 9: Termination expense.....	.....	1, 809. 76
Item 10: Factory force taking inv.....	.....	378. 96
Item 11: Removing plant back to original condition.....	.....	383. 91
	275, 586. 17	130, 944. 30

11. From the decision of the Air Service Claims Board the claimant has appealed to this Board, offering objection to the allowance under items 1, 5, 7, 8, and 9, special objection being directed to the failure to allow them any interest on the sum they have borrowed from the War Credits Board, on which sum they are being charged interest by the said War Credits Board. The claimant alleges that if the Government is charging him interest on this loan that he is entitled to interest on the deferred settlement occasioned by the termination of his contract. Claimant further contends that at the time of the receipt by it of the procurement order for 1,500,000 spark plugs that it was unaware that there was to be a termination clause



in the contract, and that when the contract was finally received by it that claimant was so committed on account of purchase of materials that it was compelled to sign the contract even though it contained the termination clause, and that by reason of the said termination clause and the Government's exercising its right to terminate thereunder, claimant has been damnified to the extent it now claims reimbursement for, to wit, \$275,586.17. Claimant further contends that at the time of the receipt of the procurement order for 1,500,000 spark plugs it was then engaged in Government and civilian work, and that an officer of the Government agreed with the claimant that the Bureau of Aircraft Production would advance claimant the sum of \$75,000 for the purpose of erecting additional buildings, and that on the strength of this claimant accepted the order, but before it could start production it received a curtailment of this order from the Bureau of Aircraft Production, stating that the said bureau would not advance any money, but that the Bureau would use its best efforts with the War Credits Board to secure to the claimant a loan on the faith of its contract, that the claimant was thereafter compelled, on account of having committed itself and being unable to secure the advance on its contract, to accept from the War Credits Board the loan of \$175,000 on which it is being charged interest, and that thereafter the claimant was refused permission to erect any buildings and on instructions and suggestions from Government officers proceeded to lease additional quarters, in which it was the intention of the claimant to put the Government work, but acting on suggestions and instructions from Lieut. Worthem the claimant moved a portion of its civilian business into the rented quarters and devoted its entire third and fourth floors of its factory to the production of spark plugs for the Government, and by reason of such rental and moving of its commercial business to the leased buildings it should be reimbursed by the Government for the expense of leasing, repairing the buildings for manufacturing, and for the expense of removing from the said buildings to its old quarters after the termination of the spark-plug contract by the Government.

11. Claimant's further contention is that the contract for the manufacture of the spark plugs, upon termination of the same, should be treated as a cost-plus contract, and that in a settlement upon termination petitioner should be paid the difference between the cost of all machinery facilities and the appraised value as a part of the cost of production upon termination, and that no part of amortization of such machinery facilities should be absorbed in the price paid by the Government for the 200,000 spark plugs manufactured.

## DECISION.

1. Claimant contends that the contract under which the spark plugs were being manufactured was a cost-plus contract, and that upon termination petitioner is entitled to a settlement upon the basis of cost plus 15 per cent. This Board is of opinion, however, that the contract for the manufacture of the spark plugs was not a cost-plus contract, but a contract for the manufacture of spark plugs at a unit price to be determined by the cost of manufacture of the first 300,000 plus 15 per cent added thereto. That should be considered certain which is capable of being made certain. Since this was a fixed-price contract, upon a termination of the same the terms of the termination clause in the contract are brought into full operation. Petitioner's contention that it is entitled to be paid upon termination the entire costs of all facilities provided for the contract follows naturally upon petitioner's claim that it was a cost-plus contract. It is obvious, however, that if the entire 1,500,000 spark plugs had been manufactured the 15 per cent profit would have completely absorbed the amortization of all special facilities, and the obligation of the Government would have been at an end; so that it is equally obvious that where a portion of the spark plugs have been manufactured the 15 per cent profit paid upon them should absorb the amortization of the special facilities in the proportion that the manufactured and delivered articles bear to the number called for under the contract. Nor do we think it makes any difference that the fixed price per spark plug was determined upon the cost of the manufacture of 200,000 instead of 300,000, as this method of ascertaining the fixed price did not and could not operate to the prejudice of the claimant.

2. In line with the view above expressed, therefore, we will proceed to discuss the items disallowed by the Air Service Claims Board upon which appeal was taken to this Board.

*Item No. 1.*—Part of this claim, involving the sum of \$181.63 alleged to be due on account of experimental costs and charges, was, at the hearing, withdrawn by the claimant. We are of the opinion that the transfer of that part of plant alterations, etc., by the Air Service Claims Board from item No. 1 to item No. 7 is correct, and that the claimant is not entitled to 15 per cent profit thereon. The appeal on administrative and executive expenses referred to under item No. 1 was, at the hearing, withdrawn by the claimant. This included the sum of \$2,987.50 claimed by the claimant as salary of Mr. Mosler in addition to that allowed by the Air Service Claims Board. In claimant's appeal under this item he alleges he is entitled to the sum of 15 per cent on claims mentioned in this item and disallowed. This Board is of the opinion that the Air Service Claims Board was cor-

rect in its position and that the claimant is not entitled to 15 per cent on any of the claims referred to in this item and disallowed by the said Claims Board. The same is therefore disallowed.

*Item No. 5.*—Upon consideration of the evidence, this Board is of the opinion that as the claimant received funds from the United States Government to improve the buildings which it had leased for a period of three years from the 1st day of October, 1918, to the 1st day of October, 1921, at \$60 per month, that upon the suspension of the contract and after 13 months of occupation of the said building by the said claimant the sublease of the said building by the claimant on the 1st day of November, 1919, for the remaining period of 23 months, at \$200 per month, was made possible by the improvements placed in the building by the claimant, for which due allowance has been made it by the Air Service Claims Board, and that the said claimant should therefore be charged with the increased rent for the period of 23 months which it received over and above the \$60 per month for which it is committed under the original contract of lease. This Board is further of the opinion that the petitioner is entitled to no further relief under this item.

*Item No. 7.*—This deals with increased plant facilities, construction, and alteration, but chiefly with the difference between the cost of the increased facilities and their appraised value and the amount allowed contractor. The Air Service Claims Board found that the claimant was entitled to 87 per cent of the cost of the increased plant facilities less the present salvage value of \$16,000 and that the remaining 13 per cent of the said cost of the additional facilities was absorbed in the partial performance of the contract. This Board is of the opinion that the Air Service Claims Board is correct, for, in the manufacture of the 200,000 spark plugs the claimant received the sum of 15 per cent of the cost of these plugs as profit, and out of this profit it was and became the duty of the claimant to amortize to that extent the cost of its facilities secured for the performance of the contract in question.

The termination clause of the contract under article "d," provides among other things, as follows:

"The United States shall then pay to the contractor such part of the amount by which the cost to the contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof, as shall be fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated: and in determining what amount is so fairly and properly apportionable due regard shall be had to the extent to which this contract shall have been performed and the extent to which the cost of said plant, facilities, and equipment should be regarded as having been absorbed by such performance."

to amortize the cost of the additional facilities. To allow claimant any further sum under this item would be to place a construction on the contract in question that is at variance with the express and positive provisions of the said contract. The decision of the Air Service Claims Board is, therefore, affirmed and all relief asked for under this item is denied.

*Item No. 9.*—The claimant withdrew item No. 9, for \$366.36, "termination expenses," and substituted in its place an item of \$543 claimed as being due up to the date of the termination of the contract as interest on mortgage existing on plant at date of contract, and the further sum of \$186 claimed as interest on mortgage after the termination of the contract. These items of interest were disallowed by the Air Service Claims Board, and we think properly so. There is no provision under the contract that would authorize any Government officer to pay to the contractor any such item of interest, nor is there any construction that could be reasonably given to his contract that would authorize this Board to allow claimant any interest on such an item. This Board has already decided that the contract in question is not a cost-plus contract and the decisions of our Supreme Court have consistently held that interest was not a proper charge against the Government unless specifically authorized under the contract. All relief asked for by the claimant under this item is, therefore, disallowed.

*Item No. 11.*—Under this item claimant alleges it should be allowed the sum of \$340, covering an estimated price for moving back to the old plant, together with the further sum of \$50 for removing one safe from the new plant to the old plant. We are of the opinion that the evidence produced by the claimant is insufficient to justify this Board in overruling the decision of the Air Service Claims Board. This item is, therefore, disallowed.

Taking up the next contention of the claimant for interest, it is necessary to discuss this a little more fully. The original procurement order for 1,500,000 spark plugs, which was later amended, stated that the Air Service would use its influence with the War Credits Board to procure claimant a loan of \$75,000. Claimant, however, when he finally approached the War Credits Board, after having been introduced by the War Department officers, succeeded in securing a loan of \$175,000 instead of the \$75,000 mentioned in the procurement order. The evidence further shows that the claimant has paid to the War Credits Board an amount equal to over one-half of the \$75,000, which was the amount originally mentioned in the negotiations between the Air Service and the claimant. The amount.

secured from the War Credits Board was greatly in excess of what the claimant estimated during the conversations and negotiations with the Bureau of Aircraft Production would be necessary for its purpose. The allegation of the claimant is that the United States Government should pay the interest on the amount still due claimant on account of the termination of its contract with the Government, on the theory that if the Government had promptly settled with the claimant at the time of the termination of the contract claimant would thereby have been enabled to have settled with the War Credits Board, and that the fact that claimant has continued to have charged against it interest on the sum of \$137,000 (the balance due the War Credits Board) is due entirely to the fault of the Government in not settling with the claimant, and that the Government should, therefore, allow interest on the unpaid balance due contractor from the Government or should direct the War Credits Board to eliminate the item of interest on the \$137,000 from the date of the termination of the contract to the date of the final payment by the Government of the amount found due claimant.

The loan secured from the War Credits Board was a distinct and separate transaction, separate and apart from the contract in question and a transaction over which the War Department exercised, and attempted to exercise, no control. It was a separate and a distinct outstanding obligation that the contractor made with the War Credits Board for the purpose of enabling it to put itself in a position to perform the contract which it entered into with the United States Government. The War Department has no authority over the War Credits Board to compel it to eliminate any item of interest or to interfere in the contract existing between claimant and the said Board, nor can the Government allow claimant any interest on any claim it has against the Government, the decisions of the Supreme Court of the United States having consistently held that no interest is allowed on any claim against the Government. No interest can therefore be allowed to the petitioner upon its claim against the War Department, nor can any allowance be made petitioner for any interest due upon any debts due by petitioner to the War Credits Board; and in its findings in respect to these matters the action of the Air Service Claims Board is approved.

The next item presented is a claim for \$2,000 on account of Mr. Sperling, attorney and secretary of the claimant. This is an item for preparing the claim and presenting the same, which, upon well-settled principles, must be disallowed.

The next item is for \$500 on account of the outside auditors checking up the claim of petitioner for presentation to this Board. This

is an expense claimant was put to solely in the presentation of his claim, and must be disallowed as there is no provision of the contract under which claimant was operating that would authorize this Board to allow any such item. The termination clause in the contract limits the amounts that can be paid claimant.

*Item No. 8.*—Under this item claimant asks for \$21,042.86 on account of the termination and reduction of the contract from 300,000 to 200,000 plugs. Neither in the papers that he has filed before the Air Service Claims Board nor in his notice of appeal to this Board has claimant gone into this matter to show how he arrived at the amount he claims. We do not think that any allowance can be made under this item, as under the provisions of the contract the Government reserved the right to cancel on 10 days' written notice. The termination clause provides that in the event of suspension the Government would pay the contractor for all completed articles and 15 per cent thereof and a 10 per cent profit on raw materials and partly finished goods. Since this was a regularly executed and signed contract, the claimant is bound by the terms thereof, and all relief asked for under this item must be disallowed.

3. Claimant throughout the presentation of his claim laid great stress upon the fact that at the time it received the procurement order for 1,500,000 spark plugs there was no intimation in the said procurement order, nor had claimant any idea that when the contract finally came through for its signature the same would contain a termination clause, and that when the contract was finally received containing the termination clause the claimant had so committed itself for materials and had on hand so many materials for the performance of the said contract that for him to refuse to execute the said contract would be suicidal; and that Maj. Bubb, at the time of the receipt of the contract, verbally informed contractor that there would be no termination of the contract, and that the contract as forwarded to the claimant was the only kind of a contract the Government would enter into.

4. The claimant was thereby put on notice and well knew that the contract he signed after this conversation with Maj. Bubb, or any other Government officer, contained a termination clause, and that the Government could, at any time it so elected, cancel the contract and pay him in accordance with the termination clause therein contained. The Government, having elected to cancel the contract, can only settle with the claimant in accordance with the termination clause therein contained, and no conversation that the claimant had with any officer prior to the signing of the contract can at this time be received to vary or contradict its explicit terms. It is an elementary principle of law that all prior or contemporaneous negotiations are merged into the written contract and that the contract as finally



signed represents the final meeting of the minds of the parties. This Board is, therefore, of the opinion that this contention of the claimant is without merit. For the foregoing reasons all relief asked for by the petitioner in this case upon appeal from the decision of the Air Service Claims Board, except that granted under Item No. 5, must therefore be denied.

DISPOSITION.

A copy of this decision will be furnished to the Claims Board, Air Service, for its information and guidance.

Mr. McCandless and Maj. Farr concurring.

## TOPICAL INDEX.

### VOL. VI.

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#### A.

##### ACCEPTANCE.

*See* CONTRACTS, WHAT CONSTITUTES.

##### ACT OF JUNE 3, 1916, CONSTRUCTION OF.

Where an act provides for the taking of private property, and where, through the omission to provide for the making of compensation, or where, through the use of inapt words, the provision for compensation appears not to be as broad as that authorizing the taking, the defect will be supplied. (Seaboard Chemical Co., Case No. 1679, VI these Dec., 752.)

##### ACT OF MARCH 2, 1919.

ACT OF MARCH 2, 1919, CONSTRUCTION.

*See* JURISDICTION.

##### ADDITIONAL COSTS.

##### ADDITIONAL EXPENSE.

##### ADDITIONAL WORK.

*See* COSTS, ADDITIONAL.

*See also* CONTRACTS, IMPLIED.

##### AGENTS.

*See* TORTS.

##### AGENTS, AUTHORITY TO BIND GOVERNMENT.

Where the officer in charge of construction under a validly executed contract for a gas shell filling plant directed the contractor to furnish labor and materials for the repair of certain houses, not on the Government reservation, for the occupancy of Army officers, the contractor can not be reimbursed its costs so incurred, since there was no authority for ordering such work under the contract. (Central Construction Co., Case No. 2731, VI these Dec., 589.)

The National War Labor Board was established for the purpose of insuring continuous production of war supplies by industrial peace throughout the country. The authority granted to the board under the presidential order of April 8, 1918, authorized it to give assurance to employees and employers as well that its findings would be enforced by the Government. (Employees of the Minneapolis Steel & Machy. Co., Case No. 2099, VI these Dec., 835.)

Where a claimant had a contract for the manufacture of trousers for the Government at 65 cents per pair, which contract contained the usual labor-dispute clause, and prior to the beginning of production thereunder claimant advised the Government that, owing to demands of a labor union for an increase in wages based on a 75-cent per

**AGENTS—Continued.**

garment price, it could not produce the garments for the contract price, and the Acting Quartermaster General wrote claimant that the contract price had been changed in the contracts to a 75-cent maximum and that a copy of such modification had been forwarded to claimant, and claimant, relying thereon, increased its wages and completed its contract. *Held*, that the letter of the Acting Quartermaster General was sufficient authority for claimant to increase the wages of its employees, and that there was substantial compliance with the labor-disputes clause, entitling claimant to the increased unit price. (A. Mendelson & Bro. Uniform Co. (Inc.), Case No. 1732, VI these Dec., 1007.)

*See also* CONTRACTS, WHAT CONSTITUTES.

**AGREEMENT.**

*See* CONTRACTS.

**ALLOWANCE FOR SPECIAL MACHINERY.**

*See* CONTRACTS, CONSTRUCTION.

**AMENDMENT.****AMORTIZATION.****AMORTIZATION OF FACILITIES.**

Where a Canadian Corporation, which has a thoroughly equipped going plant, suitable for machining shell forgings, is offered a contract by the United States, and for purposes of its own organizes a Virginia corporation composed of practically the same stockholders, officers, and directors as the Canadian corporation, and the property of the Canadian corporation is conveyed to the Virginia corporation in exchange for its stock, and the latter corporation takes over the shell contract, it is not entitled to payment for or amortization of the cost of the buildings and equipment unless specially contracted for, which was not done in this case. (Maritime Mfg. Co., Case No. 2533, VI these Dec., 626.)

Where the claimant provided equipment for and manufactured cartridge cases for the British and French Governments under several contracts, and then with a fully equipped going plant enters into a contract with the United States in which there is no agreement of any kind as to payment for or amortization of the cost of equipment; claimant is not entitled to amortization of the cost of equipment on suspension of the contract. (New York Air Brake Co., case No. 2060, VI these Dec., 1019.)

*See also* CONTRACTS, CONSTRUCTION.

**ANTICIPATED ORDERS.**

*See also* CONTRACTS, ANTICIPATION.

**ANTICIPATORY BREACH.****AUTHORITY.****AUTHORITY OF AGENTS.**

*See* AGENTS, AUTHORITY TO BIND GOVERNMENT.

**AUTHORITY TO CONTRACT.**

*See* AGENTS, AUTHORITY TO BIND GOVERNMENT.

**AWARD.**

*See* CONTRACTS, REFORMATION.

## B.

**BOARD OF CONTRACT ADJUSTMENT, JURISDICTION.**

*See* JURISDICTION.

**BREACH OF CONTRACT.**

*See* CONTRACTS, BREACH.

**BREACH, WAIVER.**

*See* WAIVER.

**BUILDING CONTRACTS.****BUSINESS RISK.**

Where, in order to meet the increased demands for telephone service in the War Department, claimant installed increased facilities without any express agreement as to compensation but in the expectation of obtaining reimbursement through regular service charges and rentals, there is no implied agreement obligating the Government to reimburse claimant the cost of such installation which was not so absorbed on account of the intervention of the armistice. (Chesapeake & Potomac Telephone Co., Case No. 1702, VI these Dec., 531.)

When at the suspension of Government contracts claimant shows an excess inventory of material on hand over prewar years, but the evidence shows that such excess was not purchased on the faith of or for use in any particular contract, but merely provided in anticipation of future contracts, which it hoped to get, no allowance can be made for such material. (Detroit Copper & Brass Rolling Mills, Case No. 2682, VI these Dec., 478 and 488.)

Where claimant is advised that it has been recommended for an award of a contract and at the same time is cautioned against incurring expense in preparing to perform prior to the receipt of written orders or a contract the Government is under no obligation to reimburse claimant for any expense incurred by it in preparation for the manufacture of chemicals where no purchase order or contract follows the notification of an award. (Fellows Medical Mfg. Co., Case No. 2504, VI these Dec., 870.)

Where claimant installs special and increased facilities for the manufacture of acetic anhydride, an article much needed by the Government, solely in anticipation of profits therefrom there is no obligation on the part of the Government to reimburse claimant for its expense in so doing in the absence of an agreement, express or implied. (Melville-Corbett Co., Case No. 197, VI these Dec., 735.)

Where claimant heard indirectly of the Government's needs of certain articles and undertook experiments of its own accord without any order from the Government or any promise to pay experimental costs but expecting to receive future contracts, there is no implied agreement whereby the Government is obligated to reimburse claimant such costs. (Sears, Roebuck & Co., Case No. 514, VI these Dec., 436.)

The United States Government is not obligated to reimburse claimant for loss sustained in commitments made before the performance of a contract unless it is shown that such commitments were the consequence of, or were made in reliance upon, such contract. (Western Industries Co., Case No. 2491, VI these Dec., 917.)

Where claimant in undertaking the manufacture of certain products and in erecting facilities for such purpose was influenced partly by the opinions of Government representatives as to the future needs

**BUSINESS RISK—Continued.**

of steel manufacturers, and was also given advice on certain engineering questions by such representatives, it must be held that claimant assumed the entire risk of the undertaking, and that there was no agreement within the meaning of the act of March 2, 1919. (Western Reduction Co., Case No. 749, VI these Dec., 345.)

**C.****CANCELLATION.**

**CANCELLATION AFTER SUSPENSION.**

**CANCELLATION OF CONTRACT.**

**CANCELLATION FOR DEFAULT.**

**CERTIFICATE OF FAIR VALUE.****CHANGE IN SPECIFICATIONS.**

*See* **CONTRACTS, IMPLIED.**

**CLAIMS.**

**CLAIMS, DISMISSED.**

Where claimant fails to comply with requests for proof of an agreement coming within the provisions of the act of March 2, 1919, his claim must be dismissed. (W. G. Hammer (Penrod Walnut & Veneer Co.), Case No. 2750, VI these Dec., 552.)

**CLAIMS, SUBCONTRACTORS.**

*See* **CONTRACTS, WHAT CONSTITUTES.**

**COMMITMENTS TO SUBCONTRACTORS.**

*See* **CONTRACTS, ADJUSTMENT.**

**COMPENSATION.**

Where a compulsory order under section 120 of the act of June 3, 1916, requires a manufacturer to manufacture wood alcohol, and as a direct result of such order he suffers a loss, there is a taking within the fifth amendment to the Constitution of the United States for which compensation must be made.

Where the President of the United States under the act of June 3, 1916, issues compulsory orders for War Department purposes through the Secretary of War, which are complied with, the duty is imposed on the Secretary of War to make fair and just compensation for the property so taken.

Where it is provided in the act of June 3, 1916, that fair and just compensation shall be made for private property taken under the act no narrow construction will be given to those words which describe the property for which compensation is to be made, because the general intent of Congress to make compensation for all property taken under the act is clear, and any construction which does not give the words such a meaning would construe the act as unconstitutional. (Seaboard Chemical Co., Case No. 1679, VI these Dec., 752.)

**COMPENSATION, BASIS OF.**

*See* **CONTRACTS, ADJUSTMENT.**

**COMPILED STATUTES 6853b.**

*See* **CONTRACTS, CONSTRUCTION.**

**COMPLETED CONTRACTS.**

*See* **JURISDICTION.**

**CONFIRMED DECISIONS.**

*See* **DECISIONS, AFFIRMED.**

**CONFLICT BETWEEN WITNESSES.**

*See* EVIDENCE.

**CONSTRUCTION QUARTERMASTER, AUTHORITY.**

*See* AGENTS, AUTHORITY TO BIND GOVERNMENT.

**CONSTRUCTION.****CONSTRUCTION OF CONTRACT.**

*See* CONTRACTS, CONSTRUCTION.

**CONSTRUCTION OF ACT OF JUNE 3, 1916.**

*See* ACT OF JUNE 3, 1916, CONSTRUCTION OF.

**CONTEMPORANEOUS ORAL AGREEMENT.**

*See* CONTRACTS, WRITTEN.

**CONTRACTS.****CONTRACTS, ADJUSTMENT.**

*See* CONTRACTS, BREACH; CONTRACTS, CONSTRUCTION; MERGER; RELEASE.

In an adjustment under the act of March 2, 1919, a claimant is not entitled to any profit. (Alvord and Swift, Case No. 2622, VI these Dec., 327.)

Where a claimant, under the circumstances stated in syllabus 1, has completed the delivery of that portion of the articles for which it had orders, and has been paid therefor, in order for the Government to determine whether or not the claimant is entitled to additional compensation an audit should be made of the amount theretofore paid claimant and claimant should be allowed only such additional sum, if any, as will amortize the fall in value of the special equipment plus proportion of claimant's overhead as is properly chargeable to the uncompleted portion of the articles agreed to be furnished. (American Can Co., rehearing, Case No. 2216, VI these Dec., 896.)

Where the contract provided that the contracting officer might make changes in the contract requirements and that the contract price should be increased, or decreased, in accordance with the cost to the contractor; and changes are made reducing the cost to the contractor, and others that involve additional expenditures and the contractor offers to comply with the latter, if no change is made in the contract price, which offer is accepted; no additional allowance will be made for such extra expenses. (Bethlehem Steel Co., Case No. 2661, VI these Dec., 440.)

Where the contract referred to in the above syllabi provides that if the Government shall not furnish the motors within three months that the contractor shall be entitled to receive the full fixed profit, such amount is the limit of the Government's ability for profit and claimant is not entitled to recover item 2 of its claim for additional bonus. (Breese Aircraft Co. (Inc.), case No. 2456, VI these Dec., 884.)

Where claimant was induced by officers of the Government to purchase 500,000 pounds of yarn for the purpose of manufacturing 400,000 mop heads for the Government, and where the claimant was given a contract for only 288,000 mop heads, the Government is obligated under the act of March 2, 1919, to reimburse claimant the loss sustained by reason of such purchase. (Burdett Mfg. Co. (rehearing), case No. 43, VI these Dec., 317.)

Where, at a meeting of California prune packers, at which a representative of the committee on supplies of the Council of National Defense and a representative of claimant were present, it was agreed



**CONTRACTS—Continued.**

that all California packers would receive the same price for their 1917 pack of prunes and claimant was directed to hold a certain quantity of its pack for the Army, with the understanding that the price would be fixed later and that all California prune packers would receive the same price, and the Quartermaster General confirms the allotment and claimant delivers the prunes to various quartermasters on purchase orders and is paid a tentative price, which is less than the price finally paid another California prune packer, claimant is entitled to an additional allowance sufficient to equalize its price with that paid such other packer. (California Prune & Apricot Producers (Inc.), case No. 2012, VI these Dec., 191.)

In adjustment of claims under a suspended contract, the measure of loss on raw materials, which were afterwards used in commercial business, is not the difference between what claimant paid for them and what claimant subsequently paid for similar materials when it went into the market for them several months after such suspension, but is the difference between what claimant paid for the materials and the market value at the time the same materials were used by claimant. (Philip Carey Co., case No. 1491, VI these Dec., 389.)

Where the claimant under the formal contract was expected to stimulate the production of castor beans by engaging in propaganda, educating and organizing the people for a large production and to create a large source of supply for the United States, and to be remunerated from the profits, and the yield is less than anticipated, it would be fair and equitable and to the interest of the United States to reimburse and remunerate claimant for expenditures so made and services thus performed, although the formal contract was not suspended and has been performed by the contractor who has not been paid by the Government, which disputes the price. (Eliseo Espaillat, case No. 2666, VI these Dec., 302.)

Where the claimant was engaged in the manufacture of 5,000 Liberty motors under a cost-plus contract, and furnished the Government a large number of spare parts, it was improper to deduct the value of the spare parts from the amount awarded claimant on a settlement of the contract, and claimant is entitled to be paid therefor. (Ford Motor Co., case No. 2638, VI these Dec., 134.)

Where, under the provisions of a formal cost-plus percentage contract, claimant is entitled to reimbursement for the cost of maintaining and operating a commissary and the contracting officer and claimant agree as a method for determining such costs that the contractor should charge 33½ cents for each meal, and that if there was a loss under this charge the Government would reimburse claimant, but if there was a profit the Government would receive it, and meal tickets were furnished the contractors by the Government and in the formal settlement under the contract the contractor was charged with all of the meal tickets issued to it, less those accounted for by the contractor, such method of settlement was erroneous, as the contractor should only have been charged with the number of meals served at the price agreed upon, and the contractor is entitled to recover the difference between the amount so erroneously charged against it and the amount computed on the basis of the number of meals served at the fixed price. (Foundation Co., Case No. 2443, VI these Dec., 783.)

**CONTRACTS—Continued.**

Where, under the circumstances stated in Syllabus I, claimant had manufactured bark-tanned leather in excess of the amount for which it had contracts and when requested by the Government to advise it the amount of such leather on hand claimant erroneously advised the Government that it had none such on hand, which error claimant afterwards discovered and of which it advised the Government, such circumstances do not preclude claimant from recovery under the facts of this case. (Graton & Knight Mfg. Co., Case No. 576, VI these Dec., 764.)

Where the Secretary of War decides that claimant is entitled to recover a bonus provided in a contract for the manufacture of uniform coats from materials furnished by the Government, and there is a dispute as to whether the Government or the contractor is entitled to the rags and clippings, which has not been decided, payment will not be made until such dispute is determined. (Heidelberg Wolff & Co., Case No. 30, VI these Dec., 721.)

Where claimant has a formal contract for construction work which is suspended by the Government after partial performance, without fault on claimant's part, claimant is entitled to recover for the services performed, although the contract provides that 20 per cent of the amount due claimant on "each account" shall be retained until final completion of the work, and although claimant declines to complete certain parts of the work at contract price when directed so to do several months after suspension thereof. (Ives, Hanlon & Lewis, Case No. 2760, VI these Dec., 377.)

Where claimant contracted to furnish a quantity of stock steel with a stipulation that it was to receive \$24 per ton additional for such steel such additional compensation is not a bonus and does not prevent the claimant from recovering the full contract price as stipulated by such contract. (Kansas City Structural Steel Co., Case No. 2684, VI these Dec., 1002.)

The contractor is entitled to compensation to the extent of actual damages directly caused by the default of the United States. (Levy Overall Co., Case No. 1548, VI these Dec., 728.)

Where the claimants had contracts for the purchase of steel plates, and the vendor was unable to make deliveries because of the control exercised by the Government over the steel industry, which prohibited the vendor from filling the contracts, this was not a taking of private property of the claimants, for if anything was taken it was the property of the vendor. (Mill Products Corp. and Omnia Commercial Co., Cases Nos. 737 and 748, VI these Dec., 55.)

Allowances made on suspended formal contracts which contain a termination clause are governed by said clause and no allowance can be made unless provided for therein. (A. R. Mosler Co., Case No. 2659, VI these Dec., 1036.)

Where claimant contracted to sell and deliver 5,000,000 pounds of hay to the Government at a stipulated price per hundredweight and failed to deliver a portion thereof, necessitating the Government's purchase elsewhere, the Government has a right under the express terms of the contract to deduct from the amount due the claimant for hay delivered the amount paid by the Government in excess of the contract price for such hay as it was obligated to purchase by reason of the failure of the claimant to deliver the amount sold. (H. Mueller Grain Co., Case No. 2635, VI these Dec., 354.)

**CONTRACTS—Continued.**

Under the act of March 2, 1919, the Government is obligated to pay a stipulated rental for the use of claimant's passenger cars by the Ordnance Department for hauling employees at one of its plants. (Pennsylvania Railroad, Eastern Lines, Federal Administration, and Pennsylvania Railroad Co., Case No. 2514, VI of these Dec. 1033.)

Where claimant's contract for the manufacture of shirts provided that all rejected garments be removed from place of delivery by contractor within 10 days after notice of rejection, and where the Government failed to give contractor the proper notice of such rejection, the Government was not authorized to repair or remodel said shirts to meet the requirements of the contract and charge the expense thereof against the amount due the claimant on the contract, and where this method was pursued the claimant is entitled to recover back the difference between what it can show the repairs would have cost it in its own factory and the amount that the Government charged claimant for such repairs in the settlement. (Rauh & Mack Shirt Co., Case No. 2559, VI these Dec., 998.)

Where claimant rented additional space for the performance of a contract, since the rental agreement covered a term exceeding one year and was oral, and therefore was terminable at any time, there is no merit in a claim for reimbursement of rent paid after the contract was suspended and the manufacture of goods ceased. The rent paid prior to the suspension of production is chargeable to the completed portion of the contract and the rent paid thereafter is not a reimbursable item of cost. (Regenstein-Veeder Co., Case No. 2499, VI these Dec., 16.)

Where claimant's contracts for the manufacture of 500,000 shell and 520,000 adapters were suspended when partly finished, apportionment of overhead expenses such as maintenance of plants, tools, dies, jigs, insurance, timekeeping expense, and supervision of labor should be allocated in proportion to direct labor in adjusting claimant's loss by reason of such suspension.

Where claimant's contract for the manufacture of 520,000 shell adapters was suspended when only 64 per cent completed and the costs then exceeded the contract price claimant is entitled to receive such recoupment of such costs as it can show it would have made if allowed to complete the contract.

The claimant is not entitled to rent on its premises charged as a part of its overhead expenses in the adjustment of a suspended contract where it is not shown that the premises were especially provided for the performance of such contract.

The claimant is entitled to reimbursement for an amount equal to the amount of any interest which accrued by reason of such delay, provided, however, that there shall be deducted from the amount so allowed on account of interest the amount of profit, if any, which the claimant derived from the use of the Government loan during such period of delay. (Denby Motor Truck Co., No. 150-C-1555. Decisions of this Board.) (Salisbury Wheel & Axle Co., Cases Nos. 2536 and 2537, VI these Dec., 671.)

**CONTRACTS—Continued.**

Where it is orally agreed between the claimant and the Government that for each barrel of seed potatoes delivered to the Government, at an agreed price of \$4.50 per barrel, the Government would deliver to claimant 2 tons of manure valued at \$2.25 per ton, and claimant delivers 56 barrels of seed potatoes and the Government only delivers to claimant a portion of the manure, the Government is under obligation to pay claimant the difference in value between the potatoes received by it and the value of the manure delivered by the Government. (G. K. Sinclair, jr., Case No. 2719, VI these Dec., 218.)

Claim under act of March 2, 1919, by subcontractor under a proxy-signed contract for \$2,324.54 for pipe covering. The contract was changed during performance by substitution of materials and a controversy having arisen as to the price of the substituted material, viz, 85 per cent magnesia covering, it is *Held*, that the subcontractor is entitled to the list price less 12½ per cent discount. (Skinker & Garrett (John T. Livezey), Case No. 2576, VI these Dec., 300.)

Where a contractor, whose contract has been suspended, is advised by the Government that it does not desire the articles which the contractor is to furnish, the contractor is justified in selling such articles in order to reduce its damages, and the Government is entitled to be credited with the net proceeds of such sales, and it is immaterial whether or not the contractor has received the purchase price, as the risk of collecting same must be borne by the contractor.

Under the circumstances stated in the above syllabi, in order to adjust the claim, claimant should be credited at the contract price with all piling which it can show was manufactured and delivered at shipping points. Claimant should be charged with the sale price of any piling sold and the fair value of such piling remaining unsold, and claimant is entitled to be credited with any expense to which it has been put on account of piling in an unfinished state or finished piling not delivered at shipping points, in accordance with Supply Circular No. 111. (South Texas Lumber Co., Case No. 2541, VI these Dec., 369.)

Where a subcontract was suspended and afterwards reinstated on the agreement of the subcontractor to waive interest, storage, and handling charges, such charges can not be recovered from the Government by the prime contractor. (Truscon Steel Co., Case No. 2436, VI these Dec., 144.)

Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction, and this includes interest and storage charges, when the delay in payment and deliveries was the result of Government action; but where it was the fault of the prime contractor they may not be charged against the Government.

These can not be allowed, as the only handling done was to load the material on cars, and the contract provided f. o. b. cars. (Truscon Steel Co., Case No. 2437, VI these Dec., 238.)

Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come.

**CONTRACTS—Continued.**

- within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction, and this includes interest and storage charges, where the delay in payment and deliveries was the result of Government action.
- These can not be allowed, as the only handling done was to load the material on cars, and the contract provided f. o. b. cars. (Truscon Steel Co., Case No. 2438, VI these Dec., 61.)
- Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction, and this includes interest and storage charges, where the delay in payment and deliveries was the result of Government action.
- These can not be allowed, as the only handling done was to load the material on cars, and the contract provided f. o. b. cars. (Truscon Steel Co., Case No. 2439, VI these Dec., 220.)
- Where claimant's contract to machine 63,300 hubs for artillery wheels was reduced in quantity by supplemental agreements in which claimant released the United States Government from all liability under the original contract, amortization of indirect materials on suspension settlement should be based upon the quantities provided for in the supplemental and not the original contract. (Turner & Moore Mfg. Co., Case No. 2776, VI these Dec., 566.)
- On the settlement of a suspended contract for the manufacture of articles, the contract limiting the total cost in case of full performance, the amount which the claimant may recover in settlement of part performance can not exceed the maximum amount to which claimant would have been entitled under the terms of the contract in case it had been fully performed, except where damages for breach by the Government are included. (U. S. Industrial Chemical Co., rehearing, Case No. 10, VI these Dec., 65.)
- When it was agreed between claimant and the Government that if claimant would move its plant from Long Island to Richmond, Ind., that it would be awarded sufficient contracts to pay its removal expenses, and claimant was awarded a contract, which was suspended and a settlement had in which an allowance was made for removal expenses, which is deemed sufficient; no further allowance will be made. (Victor Aircraft Corporation, Case No. 2791, VI these Dec., 372.)
- And where, in addition to the above circumstances, it does not appear that the article on which loss is claimed was manufactured especially for the Government order in question, there can be no recovery for such loss before this board. (Western Industries Co., Case No. 2490, VI these Dec., 380.)
- Where claimant's system of accounting was deficient and meals were not properly charged against employees the claimant must bear the loss and not the Government. (The J. G. White Engineering Corp., Case No. 1897, VI these Dec., 854.)
- Claims for shortages or breakage while in transit to the site of the work are claims against the carriers and are not allowable under the contract. (The J. G. White Engineering Corp., Case No. 1932, VI these Dec., 201.)

**CONTRACTS—Continued.**

Where changes were made in machinery to perform prior contracts charges for such changes can not be made against a contract on which there was no production. (A. Ziegler & Sons Co., Case No. 710, VI these Dec., 742.)

**CONTRACTS, ANTICIPATION.**

Expenditures for material to supply the supposed needs of the Government, or upon advice or assurance or expectations of future contracts, are not within the act of March 2, 1919. (American Sash & Door Co., Case No. 251, VI these Dec., 121.)

Where at the suggestion of an inspector at claimant's plant and Army officers in charge of production and in anticipation of additional future contracts for the manufacture of shirts claimant installed increased facilities at its plant, there is no obligation on the part of the Government to reimburse claimant for such special facilities. (M. N. Mayehoff & Co. (Inc.), Case No. 373, VI these Dec., 109.)

Where a manufacturer of chlorate, learning of the needs of the Government therefor, and of proposed changes in specifications, installs special facilities for the manufacture of chlorate according to the proposed revised specifications, but without any agreement, express or implied, with any authorized agent of the Government, there is no obligation on the Government to reimburse claimant. (Monmouth Chemical Co., Case No. 2641, VI these Dec., 23.)

No agreement, express or implied, to purchase 10,000,000 pounds of brass rods results from statements by an officer of the War Department made to claimant to the effect that when the accounts of the War Department were cast up so as to show where it stood on rods, there would be given claimant a preliminary optional agreement proposing to place orders throughout a certain period of time for a certain amount of brass rods; especially when the officer further stated that such preliminary optional agreement was not in itself an order, and that he, the officer, had no authority to give an order for brass rods. (Mueller Metals Co., Case No. 1248, VI these Dec., 648.)

*See also* BUSINESS RISK; CONTRACTS, WHAT CONSTITUTES.

**CONTRACTS, BREACH.**

*See* JURISDICTION.

The Board of Contract Adjustment has no jurisdiction under the act of March 2, 1920, to adjust a claim growing out of a contract that has been breached. (Ireton Bros., Case No. 2669, VI these Dec., 350.)

Where claimant was so in default of deliveries on its contract to manufacture and deliver 200,000 gallons of ethyl alcohol to the Government that it could not have compelled the Government to take any part of such amount, and where there was no waiver by the Government, claimant is not entitled to reimbursement of loss sustained in its effort to perform such contract, which was suspended before any deliveries were made. (Western Industries Co., Case No. 2490, VI these Dec., 380.)

Where claimant's contract to sell and deliver a quantity of castor beans to the Government was canceled by reason of claimant's default in delivery, claimant is not entitled to reimbursement for loss sustained in his efforts to perform such contract. (Cyrus French Wicker, Case No. 1144, VI these Dec., 403.)



**CONTRACTS—Continued.****CONTRACTS, CANCELLATION.**

*See* JURISDICTION.

Where the Government canceled a procurement order by written notice, which recited that its acceptance would constitute a release to the United States of all claims and demands because of such cancellation, and claimant accepts said cancellation, and there was no mutual mistake of fact such as would authorize a re-formation, no relief can be granted to reimburse claimant for certain expenditures. (Braden Copper Co., Case No. 2695, VI these Dec., 395.)

**CONTRACTS, COMPLETED.**

*See* JURISDICTION.

**CONTRACTS, CONSIDERATION.**

Where the claimant agreed to bore steel bars at a fixed price and during the performance of the work demanded and was promised additional compensation, there was no consideration to support the promise and the additional compensation can not be allowed. (Bethlehem Shipbuilding Corp., Case No. 2798, VI these Dec., 710.)

Where upon a sufficient consideration and for mutual convenience of the parties a contract for the manufacture of airplanes and a contract and its supplement for the manufacture of spare parts for such planes are consolidated such contracts will be treated as one. (Breese Aircraft Co. (Inc.), Case No. 2456, VI these Dec., 884.)

Where the claimant had a formal contract to do certain construction work for the Government within a specified time and where an agreement was made on the part of the Government to pay claimant extra remuneration if contract was completed in less time than stated in the contract, such agreement is based upon a valuable consideration and binding upon the Government. (Central Engineering Co., Case No. 1534, VI these Dec., 844.)

The right of employees to strike for higher wages is not questioned, and for the employees to refrain from striking is a valid consideration for a promise by representatives of the National War Labor Board, so as to make the promise binding upon the Government. (Employees of the Minneapolis Steel & Machinery Co., Case No. 2099, VI these Dec., 835.)

Where a contract for the manufacture of uniform coats from materials to be furnished by the Government containing the provisions referred to in syllabus No. 1 is amended by a supplemental contract providing for additional compensation by way of a premium or bonus to the contractor based on its obligation to "use best efforts to avoid all possible waste," the clause quoted imposed no additional obligation on the contractor, and is, therefore, no consideration for the promise of additional compensation. Hence such supplemental agreement is void and the contractor is not entitled to the bonus therein provided. (Following decisions of this board in this case reported in Vol. I, Decisions of War Department, Board of Contract Adjustment, p. 287, but overruling this board's decision in the case on a rehearing.) (Heldelberg, Wolff & Co., Case No. 30, VI these Dec., 721.)

Where a supplemental contract is entered into after the time of performance has expired, fixed in an original proxy-signed contract and in formal contracts supplementing proxy-signed contracts, and with-

**CONTRACTS—Continued.**

out new or additional consideration moving to the Government for the express purpose of validating the proxy-signed contracts, such supplemental contract so entered into is invalid. (Morgan Engineering Co., Case No. 2454, VI these Dec., 37.)

A formal contract executed after the work has already been done under an informal agreement is not binding on the parties. (Pennsylvania Railroad Co., Case No. 2493, VI these Dec., 1033.)

Where claimant, a cloth manufacturer, received a supplemental contract containing a provision for a bonus for the exercise of special care in cutting Government materials, while the supplemental contract would have been void for want of consideration if it merely added the bonus provision to the original contract, it was not void in the present case, because it changed the specifications and price contained in the original contract and practically amounted to a new contract. (Jacob Reed's Sons (Inc.), Case No. 2681, VI these Dec., 29.)

**CONTRACTS, CONSTRUCTION.**

See COSTS, ADDITIONAL; CONTRACTS, ADJUSTMENT; TERMINATION; WARRANTY.

Under a provision of a validly executed contract for the manufacture of aluminum castings providing for an increase in the price to be paid by the Government in the event of any increase in the cost of aluminum, there is no merit in a claim based upon depreciation in the value of claimant's scrap aluminum due to the intervention of the armistice. Claimant's contention that this scrap, which resulted largely from its defective Government castings, and could only be reused for commercial castings, was a factor in the cost of the castings manufactured for the Government, within the meaning of the contract, is unsound.

Where claimant's Government contract provided for return of defective castings to claimant, there is no implied agreement by the Government to insure the immediate return of the castings by the engine builders to whom they had been delivered. Hence there is no merit in a claim based on depreciation of scrap aluminum caused by such delay in returning defective castings and the fall in the price of aluminum on the intervention of the armistice. (The Aluminum Castings Co., Case No. 2797, VI these Dec., 554.)

Where the claimant leased ground to the Government for a camp site, upon which there was a stockyard and trackage facilities, and it was requested to remove same; and it removed same to other ground owned by it and used it in its ordinary business and intended it for permanent use, there is no agreement or obligation on the Government to pay the expense therefor. (Atchison, Topeka & Santa Fe Railway Co., Case No. 2804, VI these Dec., 545.)

Where claimant's suspended contract provided that claimant should insure Government-owned materials at its own expense "for a reasonable time" claimant is entitled to be reimbursed the cost of insurance for the period beginning a reasonable time after suspension of the contract. (Chas. Baker Co. (Inc.), Case No. 2209, VI these Dec., 1012.)

**CONTRACTS—Continued.**

Where the Government advertises for bids on duck of a certain weight, and claimant makes a written bid therefor, which is accepted by the Government by letter, and it develops that the duck is of a lesser weight than that upon which claimant based its bid, the contract is an informal one, as the Quartermaster General has made no regulation under section 6853b, Compiled Statutes, for the sale of surplus property, and the Secretary of War has no authority to adjust a claim under such contract for damages based on a breach of warranty by the Government, said contract not coming within the provisions of the act of March 2, 1919. (Beal-Burrows Dry Goods Co., Case No. Sales BCA-5, VI these Dec., 176.)

Where claimant was manufacturing certain articles under a formal contract, and amendments thereto, at fixed prices, and entered into a supplemental contract containing new provisions as to delivery but not changing the prices as fixed by such amendments to the contract, claimant is only entitled to receive the amount fixed by its contract as amended. Having agreed to the amount of compensation claimant is not entitled to an additional amount claimed to be due on account of extra cost incurred in manufacturing the articles. (Biggam Trailer Corp., Case No. 1986, VI these Dec., 581.)

Where purchase orders provided for hay or straw f. o. b. Kansas points, taking 37½-cent rate to group 3, Texas points, there was no obligation on the claimant to pay freight rates, or any increase in rates caused by delay in shipments for which claimant was not in fault. The words "taking 37½-cent rate to group 3, Texas points" are merely descriptive of the territory to which the hay was to be shipped. (Carlisle Commission Co., Case No. 2428, VI these Dec., 334.)

Where contracts provide in substance that in the event of labor disputes likely to delay the performance of the contract that the Secretary of War may settle such disputes and that if the contractor is required to pay higher labor costs thereby that the Secretary of War shall make an addition to the contract price, and a dispute arises, which is adjusted by a representative of the Secretary of War, who raised the cost to be paid for labor and granted the contractor additional compensation, the contractor is entitled to be paid such increased compensation.

Where the claimant was also producing under several contracts, which did not contain the provision mentioned in clause one, but it was agreed by letter that all labor disputes under all contracts should be adjusted by the Secretary of War, with a corresponding adjustment of the price, an agreement arose under the act of March 2, 1919, to reimburse claimant for increased cost of labor on such contracts. (Colt's Patent Firearms Mfg. Co., Case No. 1991, VI these Dec., 875.)

When the claimant was manufacturing brass rods from material furnished by the Government, and instead of using copper furnished for that purpose, used the copper on other contracts and substituted a cheaper and secondary material for the copper on this contract: an excess of such secondary material at the suspension of the contract is not a proper allowance under the termination clause, because the substitution was not authorized, and it was not necessary for the performance of the contract. (Detroit Copper & Brass Rolling Mills, Case No. 2682, VI these Dec., 478.)

**CONTRACTS—Continued.**

Where the Government agrees with claimant that it will reimburse claimant for all direct expense in the manufacture of a rolling kitchen, according to directions of the Standardization Rolling Kitchen Board, and claimant so manufactured the kitchen and sends it by express to the Government and the kitchen is received, accepted, and paid for by the Government, claimant is entitled to be reimbursed for the express charges paid thereon by it. (Eclipse Stove Co., Case No. 2665, VI these Dec., 27.)

Claimant was working under a contract which provided that payments for material should be made as soon as practicable after acceptance, and had borrowed money from the War Credits Board under a contract, which authorized the reduction of 35 per cent from each voucher to be applied on claimant's indebtedness to the War Credits Board. There was no obligation on the War Credits Board to credit claimant with the agreed percentage of a voucher until it was issued, and claimant was properly charged with interest on the unpaid balance up to the date of the voucher. (Edison Storage Battery Co., Case No. 2609, VI these Dec., 13.)

Where the claimant had a contract for the production, sale, and delivery of castor beans to the United States, in San Domingo at a fixed price, and the contract provided that if, during the life of the contract, a higher price should be fixed by the Government, or any authorized agency thereof, the claimant should be paid such increased price, and the price was so raised for beans delivered in the United States, the claimant is entitled to such proportionate increase for beans delivered in San Domingo. (Eliseo Espaillat, Case No. 2666, VI these Dec., 302.)

A contractor producing chemicals under a cost-plus contract with a maximum prize per pound is not entitled to recover a sum in addition to the maximum amount specified as the purchase price in procurement orders simply because the cost of chemicals furnished thereunder has exceeded the maximum price named therein. (Fellows Medical Mfg. Co., Case No. 2504, VI these Dec., 870.)

Where the American Army in France was in urgent need of rubber tires and tubes, and purchased same from claimant without the price being fixed and the goods were to be delivered in France, under the circumstances in this case claimant is entitled to freight and insurance charges. (Firestone Tire & Rubber Co., Case No. 2619, VI these Dec., 282.)

Under a labor-disputes clause providing for an addition to the contract price as a part of the settlement of such disputes "in the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries" the contractor may be entitled to such an addition to the contract price even though the disputes occurred in the plant of a subcontractor, where the price of articles furnished by the subcontractor was increased by reason of the settlement of such disputes by the War Labor Board and where the contractor was required to pay such additional cost under the provisions of its subcontract. The fact that the required notice of the occurrence of the disputes was given to the Secretary of War by the subcontractor instead of the contractor is immaterial. (Citing Cohen, Goldman & Co., Nos. 2169 and 2182.) (Four Wheel Drive Auto Co., Case No. 2223, VI these Dec., 906.)

**CONTRACTS—Continued.**

Where a contract for the manufacture of uniform coats from materials furnished by the Government provides that the Government will hold the contractor responsible for such materials, and that it will be held liable for any loss or damage thereto from any cause whatever, the contractor is bound to use its best efforts to avoid all possible waste, such being the care a reasonably prudent man would use in cutting his own textiles under the circumstances of this case. (I, these decisions, 284.)

Where an original contract for the manufacture of uniform coats from materials to be furnished by the Government contains the provisions stated in syllabi Nos. 1 and 2 such provisions are not separable, but when taken together, in the absence of any evidence that the contractor did not fulfill its obligations, is the measure of the contractor's compensation and the contractor is entitled to the bonus therein provided. (Reversing on this point in this case, reported in Vol. I, Decisions of War Department, Board of Contract Adjustment, p. 287, and following this board's decision on rehearing as to the construction of the contract, but making a contrary finding of facts.) (Heldelberg, Wolff & Co., Case No. 30, VI these Dec., 721.)

Where claimant, a corporation, was manufacturing clothing from cloth furnished by the Government and its contract provided that it should be liable for any loss of such cloth while in its possession, and where some of the cloth was delivered to a truckman hired by claimant to haul it to its factory and was sold by such truckman and an employee of claimant company to outside parties and the proceeds shared by the truckman and others, including the vice president of claimant company, held, that claimant corporation had acquired constructive possession of such goods and was liable for the loss thereof by theft or otherwise under the provisions of its contract. Held, further, it was also liable, aside from the provisions of its contract, under general principles of law.

Under the above circumstances the Government is entitled to reimbursement for all Government goods which agents of claimant corporation converted while they were acting within the scope of their authority. Claimant's liability is not limited to such goods as the conspirators were found guilty of stealing in criminal proceedings but applies to all goods which claimant's agents were able to obtain because of their connection with the corporation or which were turned over to them for the purpose of the corporation's contracts with the Government. (Horowitz & Moskowitz (Inc.), Case No. 1461, VI these Dec., 911.)

The claimant, in the performance of a contract calling for the delivery of steel on a specific date, is not chargeable with delay occasioned by changes made by the Government in the plans and specifications. (Kansas City Structural Steel Co., Case No. 2684, VI these Dec., 1002.)

Under a contract for the manufacture of clothing from materials to be furnished by the Government, where the Government was in default in delivering material, the contractor could have terminated the contract. (Levy Overall Co., Case No. 1548, VI these Dec., 728.)

Where the Government is to furnish material to be manufactured and the time for the deliveries of materials is not specified it is respon-

**CONTRACTS—Continued.**

sible only for unreasonable delays, as some delay was to be expected. Claimant is entitled to an allowance for machining hard forgings not in accordance with the specifications.

Allowances made on suspended contracts, which contain a termination clause are governed by said clause and no allowance can be made unless provided for therein. (Maritime Mfg. Co., Case No. 2533, VI these Dec., 626.)

Where claimant at the instance of the Government representatives wrote to the Secretary of War agreeing to submit future labor disputes to arbitration by him or his representative on the understanding that if labor costs should be increased by any award there would be a corresponding increase in the prices of articles then under contract, which letter was acknowledged by the Secretary of War, and where disputes subsequently arose and were adjusted in accordance with the above arrangement and the arbitrator found that claimant was entitled to a corresponding adjustment of contract prices, held that there was an agreement within the meaning of the act of March 2, 1919, applicable to all contracts held by claimant at the time of the award not containing labor-dispute clauses. Held, further, that as to contracts containing labor-dispute clauses the rights of the parties are governed by such clauses. (Marlin-Rockwell Corp., Case No. 2069, VI these Dec., 848.)

Where the purchase order provided "Goods guaranteed against spoils and swells until July 1, 1919," any inspection and rejection by the Government after acceptance must be confined to that defect and cause for rejection only.

Where goods are sold by sample and are subsequently inspected, they must be compared with the sample. (Marsh Market Canning Co., Case No. 2357, VI these Dec., 163.)

When claimant agreed to manufacture cartridge clips at \$9.85 a thousand and the Government agreed to furnish 17 pounds of copper and spelter at \$3.30 per thousand, and the specifications showed that it would require 19 pounds of material per thousand clips, it was the duty of the claimant to furnish the additional material at its own expense, and there was no obligation on the Government to do so. (A. C. Messler Co., Case No. 2749, VI these Dec., 504.)

Where the parties to a contract agree therein upon some one to finally determine disputes thereunder, the determination of such person will be final in the absence of fraud or such gross mistake as to imply fraud in his decision.

Where a contract provides that the contractor shall pay the Government liquidated damages therein fixed, in case of delay except for certain causes, and the contractor is delayed in the performance of its contract by causes the responsibility for which it is exempted, and the contract provides that the contracting officer shall extend the time of performance for a period equal to that during which the contractor was so delayed, the determination by the contracting officer that claimant is entitled, on account of such causes, to such an extension of time for a period fixed by him is final and conclusive in the absence of fraud or gross mistake implying fraud on his part.

The contracting officer does not lose his authority to extend the time of performance in a contract by reason of the fact that such exten-



**CONTRACTS—Continued.**

slon is not granted until after the expiration of the time of performance, if such extension is granted for causes occurring during the time when the contractor was not in default.

Liquidated damages can not be waived by a Government officer, but an extension of time provided for in the contract is not a waiver but a mere compliance with its terms. (Morgan Engineering Co., Case No. 2454, VI these Dec., 37.)

Where the claimant had a contract for 1,500,000 spark plugs which provided that the price to be paid therefor should be fixed after the manufacture and delivery of the first 300,000, that claimant should be entitled to cost and 15 per cent profit, and the contract provided for cancellation and amortization of cost of facilities, this was a fixed-price contract, entitling the claimant to amortization, and not full reimbursement as under a cost-plus contract.

Allowances made on suspended formal contracts, which contain a termination clause, are governed by said clause and no allowance can be made unless provided for therein.

Where the claimant borrowed money from the War Credits Board and paid interest on account thereof such interest is not a proper claim under the suspended contract herein, because its payment was not provided for in the termination clause nor otherwise contracted for. (A. R. Mosler Co., Case No. 2659, VI these Dec., 1036.)

Where claimant contracted to sell and deliver 5,000,000 pounds of hay to the Government at a stipulated price per hundredweight, and failed to deliver a portion thereof, necessitating the Government's purchase elsewhere, the Government has a right under the express terms of the contract to deduct from the amount due the claimant for hay delivered the amount paid by the Government in excess of the contract price for such hay as it was obligated to purchase by reason of the failure of the claimant to deliver the amount sold. (H. Mueller Grain Co., Case No. 2635, VI these Dec., 354.)

In the case of Henry Knight & Sons, pending construction of the clause "all waste matter of every kind and nature, except rags, bags, and manure," certain waste matter by agreement of the parties was segregated, and it or its proceeds held until the meaning of the clause was determined; but no such action was taken in these claims. (The National Contracting Co., Case No. 2461, VI these Dec., 285.)

Where claimant occupied a plant for a period of eight months under an agreement to pay as rent therefor 1 cent for each cartridge case manufactured therein, and claimant's contract was suspended before the expiration of said eight months, but the agreed sum was paid for all cartridge cases manufactured, there is not further liability on the claimant or the Government on account of rent. (New York Air Brake Co., Case No. 2060, VI these Dec., 1019.)

Where claimant at the request of the Government and under a written contract providing for cost of installation, but silent as to removal, installed a sidetrack for Government use, authorized by the city of New York, by a grant to claimant, which required removal at claimant's cost, there arose under the circumstances and within the purview of the act of March 2, 1919, an implied obligation on the part of the Government to reimburse claimant the cost of removal of such

**CONTRACTS—Continued.**

sidetrack when same was no longer needed for Government purposes. (New York Central Railroad, Walker D. Hines, Director General of Railroads, Case No. 2604, VI these Dec., 50.)

Where claimant owned an automobile and used it in his work as traveling production representative of the Government under an oral agreement that he would be compensated for its use and for expenses of its operation, entered into prior to November 12, 1918, such an agreement is a continuing one so long as the officer continues to perform the same duties in the same branch of the service and uses the automobile for the agreed purposes, and he is entitled to reasonable compensation therefor under the act of March 2, 1919, although a portion of the time for which claim is made is subsequent to November 12, 1918, but he is not entitled to compensation under said act for the use of the automobile after his transfer to another branch of the service. (William H. Patterson, Case No. 2749, VI these Dec., 374.)

Under a Government contract for certain equipment and installation thereof, providing for payment of damages to the Government in case of delay in performance, the fact that the delay was due to the slowness of subcontractors in manufacturing the equipment does not excuse the contractor from paying damages to the Government. (William B. Perry, doing business as W. B. Perry Electric Co., Case No. 2660, VI these Dec., 466.)

Where claimant's contract provided that if changes in specifications should be made involving additional expense, a fair addition to the contractor's compensation might be made as determined by the Chief of Ordnance, claimant may be entitled to such additional compensation even though the changes resulted in a cheaper product, provided that claimant proves that its extra expenses on account of the change exceeded the savings in cost of production. (Pfau Manufacturing Co., Case No. 2502, VI these Dec., 712.)

Where Government officers, in the course of negotiation of contracts with an arms manufacturer for the massed production of machine guns and pistols, agreed that the manufacturer should be reimbursed the cost of increased facilities necessary for the production required, and in the case of such facilities as are manufactured in claimant's plant should be paid in addition 10 per cent of their cost, the United States became obligated within the purview of the act of March 2, 1919, to pay claimant in accordance with the terms of such agreement for all necessary additional facilities provided by claimant for the performance of the manufacturing contracts in question, either by purchase or by fabrication within claimant's plant. (Remington Arms U. M. C. Co., Case No. 1523, VI these Dec., 927.)

Where the claimant procured a lot of equipment for machine guns and pistols to use on a contract with France, which was canceled and the machinery left on its hands, and the United States desiring to control and own all available facilities for such manufacture, agreed to buy and pay for all such necessary facilities, and the correspondence and evidence shows that both parties had this particular "French machinery" in mind, that it was appraised by Government officials and used for production without charge for hire, an agreement arose under the act of March 2, 1919, to pay for such special machinery.

**CONTRACTS—Continued.**

Where the claimant offered to make gunstocks on a cost-plus basis on condition that the Government would pay the cost of all equipment of whatsoever character, which offer was accepted, an agreement arose under the act of March 2, 1919, to pay for special facilities, and the evidence shows here that certain machinery known as the French machinery was included therein. (Remington Arms U. M. C. Co., Case No. 1553, VI these Dec., 968.)

Where, under a contract with the Russian Remington Rifle Contract Trustees, the Government has an option to buy certain machinery at a price agreed upon between the Government and the trustees, or at a price to be fixed by arbitrators, one chosen by each party and a third by the two so chosen if the two are unable to agree, and thereafter the Government notifies the trustees that it desires to exercise the option, and each party appoints appraisers, who fix the price the Government shall pay for such machinery, and the machinery is taken over and used by the Government before November 12, 1918. The Government is obligated under the act of March 2, 1919, to pay therefor the price so fixed, even though the appraisal was not completed until after November 12, 1918. (Russian Remington Rifle Contract Trustees, Case No. 1537, VI these Dec., 790.)

Claim under act of March 2, 1919, by subcontractor under a proxy-signed contract for \$2,324.54 for pipe covering. The contract was changed during performance by substitution of materials and a controversy having arisen as to the price of the substituted material, viz, 85 per cent magnesia covering, it is held, that the subcontractor is entitled to the list price less 12½ per cent discount. (Skinker & Garrett (John T. Livezey), Case No. 2576, VI these Dec., 300.)

Where claimant in buying Government property was required to deposit 10 per cent of the contract price to insure payment, it is not entitled to return of its deposit while a dispute as to the amount of material to which it is entitled is pending. (Phillip P. Smith Co., Case No. Sales BCA-1, VI these Dec., 232.)

Where claimant had a contract with the Government to use certain yarn exclusively for the manufacture of fabric for its prime contractor, held, that after completion of the prime contract claimant was still bound under its direct agreement with the Government to obtain the consent of the Government before disposing of its excess yarn, and that consequently there is no implied obligation binding the Government to compensate claimant for loss suffered on account of the Government's delay in giving such consent, where such withholding of consent was not unreasonable. (Specialty Knit Goods Mfg. Co., Rehearing, Case No. 341, VI these Dec., 458.)

Under a cost-plus contract providing for reimbursement of the contractor for the cost of "Such bonds, fire, liability, and other insurance as the contracting officer may approve or require," the refusal of the contracting officer to allow the cost of public liability insurance was a proper exercise of discretion, and the Government is not obligated to reimburse the contractor for premiums paid on such insurance. (Stone & Webster, Case No. 2751, VI these Dec., 449.)

Where the contract provided that all materials furnished thereunder shall be subject to a rigid inspection and such as do not conform to the specifications shall be rejected, and that the decision of the Chief Signal Officer as to quality and quantity shall be final; in the absence

**CONTRACTS—Continued.**

of fraud such provision is binding on the claimant and this board, and the action of the inspection officers is final and conclusive. (Sussfeld, Lorsch & Co., Case No. 2464, VI these Dec., 9.)

Commitments to subcontractors by the prime contractor are items of cost against the Government and are allowable when they come within what the subcontractor might reasonably have recovered against the prime contractor in a court having jurisdiction, and this includes interest and storage charges, when the delay in payment and deliveries was the result of Government action; but where it was the fault of the prime contractor they may not be charged against the Government. (Truscon Steel Co., Case No. 2436, VI these Dec., 144.)

Where the United States Government under a proxy-signed contract agreed to furnish claimant with rough castings to be used in the manufacture of hubs for artillery wheels, an obligation arose under the act of March 2, 1919, on the part of the Government to reimburse claimant for such reasonable expense as was incurred by the claimant as a result of the Government's failure to furnish castings reasonably free from defects. (Turner & Moore Mfg. Co., Case No. 1525, VI these Dec., 770.)

Where a contract provided for liquidated damages for delay in deliveries, but contained a clause that the contractor shall not be responsible for, and no deductions shall be made for, any delays caused by direct act or failure of the United States without fault of the contractor; delays caused by changes in the specifications, or materials, can not be charged against the contractor.

Where the contract provided that the time for delivery might be extended by the contracting officer when delays were caused by the United States, or by other cause beyond the control and without fault of the contractor, an extension is proper for the causes mentioned in paragraph 1 hereof and no liquidation damages should be charged against claimant because thereof. (Vellie Motors Corporation, Case No. 2526, VI these Dec., 699.)

Where the contract required the claimant to deliver a switchboard in 75 days, but also contained a provision urging and requesting earlier delivery and does not contain any provision for additional compensation for earlier delivery, claimant is not entitled to recover for additional costs incurred to expedite delivery. (Westinghouse Electric & Mfg. Co., Case No. 2584, VI these Dec., 542.)

Under a cost-plus contract, which required the contractor to take advantage of trade discounts, failure to take advantage thereof can not be charged against the contractor when it was the fault of the Government; but when it is the fault of the contractor they may be so charged.

Where the contract provides that the Government had the right to purchase the equipment it was not bound to do so, and refusal to purchase old bicycles was proper. (The J. G. White Engineering Corp., Case No. 1897, VI these Dec., 854.)

Under a cost-plus contract it was the duty of the contractor to take advantage of trade discounts, and this applies to plant equipment subsequently purchased by the Government at cost, as well as ordinary supplies. (The J. G. White Engineering Corp., Case No. 1932, VI these Dec., 201.)

**CONTRACTS—Continued.**

A contractor under a cost-plus contract is entitled to reimbursement of necessary and reasonable expenses incurred for salaries of clerks and auditors subsequent to abandonment of work where the work was suspended by the Government under a clause of the contract calling for certain services on the part of the contractor in winding up the work. This contractual right can not be taken away by a notice of suspension which fixes an unreasonably short period for such winding up after which no expenses would be reimbursable. (The J. G. White Engineering Corp., Case No. 2452, VI these Dec., 148.)

Where the contract provided that all materials furnished thereunder before being accepted should be subject to a rigid inspection, and specified the manner of inspection and sampling, which destroyed or consumed the sample, the loss must be borne by the contractor. (William Whitman Co. (Inc.), Case No. 2742, VI these Dec., 519.)

Where the claimant purchased jute bags from the Government upon which there was no warranty or representation as to quality, the purchaser took the risk, and he is not entitled to reimbursement for inferior or defective sacks. (Cyrus French Wicker, Case No. 2729, VI these Dec., 687.)

Where a contractor working under a cost-plus contract is required to do additional work, but which was contemplated by the parties when the contract was made, there is no obligation on the Government to pay an additional fee for such work when the contract limits the amount of the fee under said contract. (James Y. Wilson, Case No. 1889, VI these Dec., 113.)

*See also* CONTRACTS, IMPLIED; CONTRACTS, WHAT CONSTITUTES.

**CONTRACTS, CONTEMPLATION.**

Where the nature of an industry requires the purchase of raw materials in advance of receipt of orders for the finished product and claimant followed this approved practice with respect to Government contracts, which were not awarded on account of the intervention of the armistice, it must be held that claimant assumed an ordinary business risk, and that the Government, in the absence of a specific agreement, is not bound to reimburse loss caused thereby. Requests by Government agents to keep on hand a supply of raw materials in contemplation of future orders, without specifying amounts of such materials or amounts or prices of such orders, are too vague and indefinite to constitute an agreement within the meaning of the act of March 2, 1919. (Midvale Steel & Ordnance Co., Case No. 2558, VI these Dec., 124.)

**CONTRACTS, COST PLUS.**

*See* CONTRACTS, CONSTRUCTION.

**CONTRACTS, FIXED PRICE.**

*See* CONTRACTS, CONSTRUCTION.

**CONTRACTS, FORMAL.**

*See* JURISDICTION.

The clear provisions of a formal contract control the rights of the parties thereto. Neither the fact that other contractors under similar contracts have presented no claims under identical provisions nor the fact that several months elapsed before claimant presented its claim is conclusive against claimant. Neither is the fact that the representatives of the Government understood that claimant had waived its rights under the provisions in question. (The R. H. Lonz Co., Case No. 2519, VI these Dec., 796.)

**CONTRACTS—Continued.**

Where a formal supplemental contract is entered into for the purpose of modifying the terms of a prior proxy-signed contract and continues the proxy-signed contract in force and effect except as modified, the effect of such supplemental contract is merely to continue the informal contract in force and effect as modified without giving it the effect of a formal one. (Morgan Engineering Co., Case No. 2454, VI these Dec., 37.)

A formal contract executed after the work has already been done under an informal agreement is not binding on the parties. (Pennsylvania Railroad Co., Case No. 2493, VI these Dec., 703.)

Where a contract, binding only upon claimant on account of its informality, is executed and substantially performed and afterwards a bill of sale purporting to be a formal contract is entered into, it does not have the effect of a formal contract, because it was not in the interests of the Government to bind itself in a matter wherein the claimant was already bound. (Russian Remington Rifle Contract Trustees, Case No. 2066, VI these Dec., 920.)

No regulations have been prescribed by the Quartermaster General, pursuant to section 6853b, Compiled Statutes, regulating sales of surplus property, and when not executed in accordance with section 3744, Revised Statutes, is an informal contract. (Louis S. Wandell & Co., Case No. 8, VI these Dec., 415.)

**CONTRACTS, IMPLIED.**

See CONTRACTS, CONSTRUCTION; COSTS, EXPERIMENTAL.

There can be no agreement implied under the act of March 2, 1919, to compensate claimant for the installation of facilities which it was obligated to install in order to properly operate as a common carrier. (Atchison, Topeka & Santa Fe Railway Co., Case No. 2784, VI these Dec., 523.)

No contract can be implied under the act of March 2, 1919, to compensate claimant for building a drain that it was legally bound to do under the circumstances under which it was constructed. (Atchison, Topeka & Santa Fe Railway Co., Case No. 2787, VI these Dec., 525.)

Where claimant's formal contract for the manufacture of trousers contained no provision for serging, but Government agents required claimant to serge most of the trousers, there is an implied agreement within the meaning of the act of March 2, 1919, whereby the Government is obligated to pay for such serging. (Chas. Baker Co. (Inc.), Case No. 2209, VI these Dec., 1012.)

Where a contract for airplanes providing that the Government will furnish the motors therefor to be installed by claimant provides a schedule of deliveries for the completed planes there is an implied obligation on the part of the Government to deliver the motors to the contractor within such time as will reasonably enable the contractor to install the motors so as to meet the schedule of deliveries. (Breese Aircraft Co. (Inc.), Case No. 2456, VI these Dec., 884.)

Under the above circumstances an alleged custom to charge for temporary installations, such as the installation of equipment for the War Department proved to be—a practice alleged to be generally approved by public service commissions—does not overcome a presumption arising from the previous course of dealings of the parties that no installation charge would be made. Nor can an obligation be implied from the fact that the equipment was unusual, being a "central



**CONTRACTS—Continued.**

office " equipment instead of a private branch exchange, such as is usually installed by telephone companies. (Chesapeake & Potomac Telephone Co., Case No. 1702, VI these Dec., 531.)

Where claimant, at the request of the Government, carried on certain tests of explosives at its testing grounds for the benefit of the Government there arose an implied obligation within the purview of the act of March 2, 1919, to reimburse claimant for the necessary costs expended on behalf of the Government in making such tests. (E. I. DuPont de Nemours Co., Case No. 2431, VI these Dec., 1016.)

Where the claimant at the request of the War Industries Board devoted one of its furnaces exclusively to the production of low phosphorous pig iron, with a promise that such board would find purchasers for all such iron produced and make allocations thereof through its customary machinery, there arose under the circumstances and within the purview of the act of March 2, 1919, an implied obligation on the part of the United States Government to reimburse claimant for its loss sustained by reason of so devoting its energies. (Eastern Steel Co., Case No. 2748, VI these Dec., 612.)

Where claimant in an attempt to develop certain camera devices for the Government prepares plans and specifications for said devices and delivers same to the Government, at the request of a duly authorized agent thereof, and thereafter the plans and specifications are used in Government work, there is an implied agreement on the part of the Government within the meaning of the act of March 2, 1919, to reimburse claimant for the reasonable value thereof. (Sherman M. Fairchild, Case No. 504, VI these Dec., 746.)

Where claimant was promised an order for 300,000 yards of duck cloth at price to be later fixed by appraisement, and where claimant was advised and instructed to proceed to perform such order, even though the formal order was never given and no deliveries made thereunder, there arose under the act of March 2, 1919, an obligation on the part of the United States Government to reimburse claimant for loss sustained in preparing to perform such order. (Foster & Stewart Co., Case No. 642, VI these Dec., 811.)

Where the proposal submitted by claimant contained a stipulation that all taxes thereafter imposed by Congress should be taken care of or paid by the Government, and this stipulation was omitted from the formal contract, which claimant refused to sign or perform until assured and promised by duly authorized Government officers that the taxes, if imposed, would be taken care of through the medium of a separate agreement, and, relying thereon, claimant executes and performs said contract and taxes are imposed, an implied agreement arose under the act of March 2, 1919, to reimburse claimant for such taxes. (Garford Motor Co., Case No. 2740, VI these Dec., 1025.)

Where claimant was given a purchase order to furnish two (2) recoil cylinders to be made according to certain plans and specifications from material to be furnished by the Government, at a stipulated price, and where during the process of construction it was necessary to change the plans and specifications by reason of defects in the material furnished by the Government, which change in plan occasioned an extra expense in manufacture, there arose within the purview of the act of March 2, 1919, an implied obligation on the part

**CONTRACTS—Continued.**

of the Government to reimburse claimant for the extra expense occasioned by the changed specifications. (General Fire Extinguisher Co., Case No. 2530, VI these Dec., 618.)

Where a contractor who has a cost-plus contract performed additional work which the contracting officer had no right to call for under the terms of the contract, there arose an implied agreement within the meaning of the act of March 2, 1919, whereby the Government became obligated to pay claimant a fee for such additional work. (J. G. White Engineering Corporation, No. 1895.) (Gillsonite Construction Co., Case No. 2135, VI these Dec., 273.)

Where the Government commandeers a warehouse and orders all owners of goods stored therein to remove same, and in compliance with such orders claimant removes a large quantity of cotton which it had stored in such warehouse, there is an implied agreement on the part of the Government to reimburse claimant for its expense in removing such cotton. (Gordon McCabe & Co., Case No. 2507, VI these Dec., 797.)

Where claimant had manufactured bark-tanned leather, not a commercial product, for Army shoes at the request of the Government and with the understanding that the Government would take off of claimant's hands all such leather which claimant was unable to sell to shoe manufacturers, there is an agreement within the meaning of the act of March 2, 1919, whereby the Government is under obligation to compensate claimant for its loss on all such leather manufactured by it conforming to Government specifications for which claimant has been unable to find a purchaser. (Graton & Knight Mfg. Co., Case No. 576, VI these Dec., 764.)

Where claimant is notified by a duly authorized agent of the Government that its bid for the manufacture of jam has been accepted, and claimant is directed to proceed with its manufacture without waiting for formal contract, and claimant is afterwards notified that no formal contract will issue, there is an obligation on the part of the Government to reimburse claimant for any loss it may have sustained on account of complying with directions to proceed. (Haas Bros., Case No. 2082, VI these Dec., 11.)

Where after consulting an officer of the Ordnance Department, who stated that incoming freight to a certain arsenal might amount to 250 cars a day, claimant built a siding on its own right of way at a considerable distance from the arsenal in order to take care of the traffic, there was no implied agreement within the meaning of the act of March 2, 1919, whereby the Government became obligated to pay claimant the cost of constructing the siding. (Lehigh Valley Railroad, Case No. 2625, VI these Dec., 392.)

Where a contractor is engaged in production under a written contract and a purchase order, and is directed by duly authorized agents of the Government to perform extra work not contemplated under original agreement, there is an implied agreement within the purview of the act of March 2, 1919, whereby the Government is obligated to reimburse claimant in the amount of the extra work. (Liberty Iron Works, Case No. 1818, VI these Dec., 92.)

Under the act of March 2, 1919, the Government is under no implied obligation to reimburse a railroad for construction of tracks on its

**CONTRACTS—Continued.**

own right of way for the purpose of supplying a Government manufacturing plant with proper railroad facilities. Nor does such an implied obligation arise from General Order 15 of the Railroad Administration providing that "generally speaking an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own that part of the track on the right of way from the clearance point to the right of way line," a Government manufacturing plant coming within the exception referring to special cases. (New York Central Railroad, Walker D. Hines, Director General Railroads, Case No. 2606, VI these Dec., 659.)

Where claimant's contract to manufacture a quantity of barrack bags was entered into with the understanding that the bags were to be made according to certain samples and specifications submitted, and where the Government required them to be made of a different material and a different design than that called for in the contract, which necessitated additional expense for claimant, and where claimant was required thereby to do what was not contemplated by the original contract, there arose under the circumstances an implied agreement within the purview of the act of March 2, 1919, under which the Government is obligated to reimburse claimant for the loss sustained by the reason of the changed conditions. (F. L. O'Brien, Case No. 2610, VI these Dec., 995.)

Where the Government contracted with claimant for construction of sidings on Government property, with the understanding that claimant would stand the cost of that part of the siding on claimant's right of way, and later claimant found it necessary to relocate that part of the siding at considerable expense, there is no implied agreement obligating the Government to reimburse claimant its costs so incurred. (Pennsylvania Railroad Co., Case No. 2493, VI these Dec., 703.)

The construction of railroad facilities to handle traffic in connection with an Army cantonment does not raise an implied agreement on the part of the Government to pay for same. (Piedmont & Northern Railway Co., Case No. 2698, VI these Dec., 292.)

The construction of railroad facilities to handle traffic in connection with an army cantonment does not raise an implied agreement on the part of the Government to pay for same. (Piedmont & Northern Railway Co., Cases Nos. 2700, 2704, 2705, 2706, VI these Dec., 298, 296, 294, 249.)

Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks on its own right of way for the purpose of supplying a Government camp with proper railroad facilities. Nor is such an obligation to be implied from a request by a Government officer to lay a frog and switch on its main line for the same purpose. (Seaboard Air Line Railroad, Federal Administration, Case No. 2654, VI these Dec., 550.)

Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks or railway station on its own right of way for the purpose of supplying a Government camp with proper railroad facilities. Nor

**CONTRACTS—Continued.**

is such an obligation to be implied from a request by a Government officer to lay a frog and switch on its main line for the same purpose. (Seaboard Air Line Railroad, Federal Administration, Case No. 2655, VI these Dec., 529.)

Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for construction of tracks on its own right of way for the purpose of supplying a Government camp with proper railroad facilities. (Seaboard Air Line Railway Co., Case No. 2656, VI these Dec., 560.)

Under the act of March 2, 1919, there is no implied obligation on the part of the Government to reimburse a railroad for the purchase of right of way and construction of tracks thereon for the purpose of supplying a Government camp with proper railroad facilities. Nor is such an obligation to be implied from a statement of the camp requirements by a Government officer. (Southern Railroad Co.; Atlantic Coast Line; Seaboard Air Line Railway Co., Cases Nos. 2642-2645; 2647-2648; 2627, VI these Dec., 558.)

Where a subcontractor, under a formal contract, was urged to continue production and assured that it would be protected from loss by the Government if prime contractor failed to perform its agreement, no agreement arose between claimant and the Government, for all that was meant was that in the event of any adjustment of the prime contract suitable measures would be taken to protect the interests of the subcontractor. (Standard Gas Engine Co., Case No. 2400, VI these Dec., 456.)

Where in the course of negotiations for a contract for the manufacture of O. D. webbing claimant is told over the phone "to secure the yarn, that the order would come along," and also received a letter that the formal order was in preparation, an implied contract arose to reimburse claimant for expenditures on the faith thereof, although no formal contract was subsequently issued. (A. Ziegler & Sons Co., Case No. 710, VI these Dec., 742.)

*See also* **CONTRACTS, WRITTEN.**

**CONTRACTS, INFORMAL.**

*See* **CONTRACTS, FORMAL.**

**CONTRACTS, INVALID.**

*See* **CONTRACTS, CONSIDERATION.**

**CONTRACTS, NONPERFORMANCE.****CONTRACTS, ORAL.**

*See* **CONTRACTS, WHAT CONSTITUTES; CONTRACTS, CONSTRUCTION; WRITTEN CONTRACTS.**

**CONTRACTS, PREPARATION.**

*See* **CONTRACTS, ANTICIPATION.**

**CONTRACTS, PROMISE.****CONTRACTS, PROXY-SIGNED.**

*See* **CONTRACTS, FORMAL.**

**CONTRACTS, RECOMMENDATION.**

*See* **CONTRACTS, ANTICIPATION.**

Where an officer of the Government stated that in the event of the erection of a mill by claimant for the purpose of placing it in a position to manufacture brass rods for the Government he would be glad to recommend the giving of an order for brass rods but at the

**CONTRACTS—Continued.****CONTRACTS, TERMINATION.**

When a suspended formal contract contains a termination clause, settlement must be made within the terms of the termination clause, and no item of expense can be allowed unless provided for therein. (Detroit Copper & Brass Rolling Mills, Cases Nos. 2682 and 2683, VI these Dec., 478 and 488.)

**CONTRACTS, WHAT CONSTITUTES.**

See **CONTRACTS, IMPLIED; EVIDENCE.**

The proposal of a contractor and its acceptance by the Government, together with a direction to order necessary materials and to prepare to execute the work, constitute an agreement within the meaning of the act of March 2, 1919. (Alvord & Swift, Case No. 2622, VI these Dec., 327.)

Where claimant, in response to a telegram from an officer connected with the operation of the Air Service Railway stating that an engine on their railroad had turned turtle and requested claimant to send its wrecking crews, with which claimant complied, there arose under the circumstances in the case an implied contract within the purview of the act of March 2, 1919, which obligated the Government to pay claimant the fair and reasonable value of its services therein rendered. (Atlantic Coast Line R. R., Case No. 2733, VI these Dec., 268.)

Where claimant constructed a railroad track on its own right of way, under an agreement with a civic organization which failed to bear its agreed portion of the expense, and there was no agreement, express or implied, on the part of any authorized agent of the Secretary of War, or of the President, there is no obligation on the Government to pay therefor, although the track was used exclusively for Government purposes and claimant derived no revenue therefrom. (Atlantic Coast Line R. R. Co., Case No. 2783, VI these Dec., 518.)

The recommendation of an award of a contract does not amount to an agreement within the meaning of the act of March 2, 1919. (Charles Baker Co. (Inc.), Case No. 653, VI these Dec., 412.)

Where a construction contract contains no provision authorizing the employment of attorneys by the contractor at the expense of the Government, the contractor can not be reimbursed for payment of such fees even though the attorneys' services resulted in a saving of money to the Government. Nor is it the duty of the Government to pay attorneys' charges which have been incurred in the defense of a groundless suit against the contractor even though the occasion for the suit may have been the action of agents of the Government in arresting a certain person. (The Central Construction Co., Case No. 2731, VI these Dec., 589.)

Before the Secretary of War is authorized to settle a claim under the act of March 2, 1919, there must have been an agreement, express or implied, and to constitute an agreement there must have been a meeting of the minds of the contracting parties on all essential details of the transaction.

Where the Government issued purchase orders and a written contract to claimant containing stipulations as to the place of growing castor beans and places the delivery to which claimant did not agree, and refused to sign, there was no meeting of the minds and no agreement. (Coconut Plantations Co., Case No. 1683, VI these Dec., 607.)

**CONTRACTS—Continued.**

Where claimant was unable to meet the requirements of its Government contracts, which were accordingly canceled by agreement, and thereafter, at claimant's solicitations, a Government representative offered to recommend the reinspection of rejected articles upon certain conditions, and also the purchase of the articles, if on inspection the rejections did not exceed 3 per cent, held that since this offer was not accepted prior to November 12, 1918, there was no agreement within the meaning of the act of March 2, 1919. (Collier Manufacturing Co., Case No. 726, VI these Dec., 461.)

Where claimant is engaged in production under Ordnance Department contracts, and being desirous of "gas coal" requests a liaison officer between the Ordnance Department and the Fuel Administration to secure an allotment of coal to claimant, and by mistake "steam coal" is delivered instead of the coal ordered, which steam coal is billed to claimant at a higher price than it could have purchased similar coal in the vicinity of its plant, and claimant pays for the coal at the price at which it is billed, there is no implied agreement on the part of the Government to reimburse claimant for the excess cost of the coal under the act of March 2, 1919. (Eastern Malleable Iron Co., Case No. 2158, VI these Dec., 179.)

Where employees engaged in the production of war material are dissatisfied and threatening to strike for higher wages and representative of the National War Labor Board promise such employees that if they will not strike that the board will investigate and determine the matter of wages and that its findings will be enforced by the Government, there is an agreement within the meaning of the act of March 2, 1919, and if the National War Labor Board awards an increase of wages to such employees the Government is under obligation to pay such employees as were actually engaged upon Government contract work the difference between the wages received by them for such work and the wages so established by the National War Labor Board. (Employees of the Minneapolis Steel & Machinery Co., Case No. 2099, VI these Dec., 835.)

Where public-service corporations canceled their orders with claimant for turbines, and the War Industries Board, which had control of the manufacture and distribution of turbines, requested claimant not to divert the turbine materials to other uses, but to keep the turbines on its manufacture schedules pending efforts by the board to secure purchases or a guaranty that the turbines would be purchased, to which request claimant consented, but the efforts of the board to find purchasers or to secure a guaranty were unavailing, there is no obligation on the Government to reimburse claimant for its expense in producing the turbines, as there was no agreement for such reimbursement, either express or implied, and the turbines were not taken over or commandeered by the Government.

Where the War Industries Board, which had control of the manufacture and distribution of certain machinery, issued directions to manufacturer as to how such machinery should be allotted and what place such machinery should take in the manufacturer's schedule of production, such instructions under the facts of this case did not import a financial obligation on the Government. (General Electric Co., Cases Nos. 419 and 420, VI these Dec., 774.)



**CONTRACTS—Continued.**

Where claimant had a contract for the manufacture of a certain number of propellers and was ordered to ship five propellers for a certain purpose and thereupon wrote a letter to the effect that it understood that this was an additional order but was immediately informed by telegram that the five were to apply on the original contract. Held, that there was no agreement within the meaning of the act of March 2, 1919, whereby the Government is obligated to compensate claimant for loss caused by this mistake. (Maddox Table Co., Case No. 1915, VI these Dec., 357.)

Where the officers and principal stockholders of the claimant company guaranteed the United States that a loan of \$1,000,000 would be properly expended for facilities, in the absence of any promise they are not entitled to any pay therefor as they were merely guaranteeing the honesty of the company they controlled. (The Maritime Mfg. Co., Case No. 2533, VI these Dec., 626.)

Where the claimant was required to hold a part of its 1918 pack for Government use, and claimant complied, and after examination of a number of sample cans the entire lot was accepted, this completed the contract, and the Government was bound although the tomatoes were inspected and rejected several months later. (Marsh Market Canning Co., Case No. 2357, VI these Dec., 163.)

Where the nature of an industry requires the purchase of raw materials in advance of receipt of orders for the finished product and claimant followed this approved practice with respect to Government contracts, which were not awarded on account of the intervention of the armistice, it must be held that claimant assumed an ordinary business risk, and that the Government, in the absence of a specific agreement, is not bound to reimburse loss caused thereby. Requests by Government agents to keep on hand a supply of raw materials in contemplation of future orders, without specifying amounts of such materials or amounts or prices of such orders, are too vague and indefinite to constitute an agreement within the meaning of the act of March 2, 1919. (Midvale Steel & Ordnance Co., Case No. 2558, VI these Dec., 124.)

Where the claimants had contracts for the purchase of steel plates and the vendor was unable to make deliveries because of the control exercised by the Government over the steel industry, which prohibited the vendor from filling the contracts, this was not a taking of private property of the claimants, for if anything was taken it was the property of the vendor.

Where the contract of sale provided that the vendor should not be responsible for damages caused by Government control or interference, the Government is not liable to the claimant for any such loss when there is no agreement, express or implied, between it and the claimants.

Where it appears that the decline in price causing the loss occurred prior to and independent of Government control there is no liability on the Government. (Mill Products Corporation and Omnia Commercial Co., Cases Nos. 737 and 748, VI these Dec., 55.)

Where claimant was informed that because of unfairness to competitors, who were required to take orders for small rods with orders for large ones, it could not expect Government orders for large size rods unless it was equipped to manufacture small as well as large

**CONTRACTS—Continued.**

brass rods, and thereupon it procured additional equipment, so as to be able to manufacture small rods, there was no promise of orders by the Government upon which the expense so incurred would be chargeable to the Government. (Mueller Metals Co., Case No. 1248, VI these Dec., 648.)

Where an employee of the Ordnance Department uses his own machine in the necessary service of the Government in the performance of his duties, and on the authority of the chief production officer of the Philadelphia district, who promised that the Government would pay therefor, an agreement arose under the act of March 2, 1919, to remunerate claimant therefor. (William H. Patterson, Case No. 2794, VI these Dec., 374.)

Where, pursuant to request for bids for the manufacture of twill webbing, claimant submits a bid by telegram, in which immediate answer is requested because of the necessity of buying yarns, and on the following day the Government advises claimant that it proposes to send contracts for a definite quantity of webbing at prices therein specified, and subsequently does send such contracts, there is an informal agreement within the meaning of the act of March 2, 1919, and claimant is entitled to be reimbursed for loss on commitments for yarns and for expense incurred in repairing her looms preparatory to the execution of the contract. (Pentucket Narrow Fabric Mills, Cases Nos. 686 and 2304, VI these Dec., 774 and 781.)

Where the proof shows that a subcontractor could have canceled its orders for material without loss, but retained it and used it in its private business, it had no claim for reimbursement for loss, if any, on suspension or cancellation of its contract with the prime contractor. (Philadelphia Boiler Works, under Foundation Co., Case No. 2501, VI these Dec., 198.)

Where claimant was urged by the Steel Section of the War Industries Board to increase its monthly production of shell steel and thereupon purchased materials and facilities with a view to such increased production, such stimulation of production for general war purposes does not amount to an agreement within the meaning of the act of March 2, 1919, to compensate claimant for losses on such materials and facilities due to the intervention of the armistice. (Republic Iron & Steel Co., Case No. 1502, VI these Dec., 675.)

Where the claimant had a contract with a municipality in Porto Rico for the construction of a road, the plan of which was changed at the suggestion of United States officers, with the consent of the claimant, and an Army officer was designated as constructing engineer by the municipality and made subsequent changes in the plans, which diminished the work and claimant's compensation, there was no contractual relation with the United States and no liability for such changes. (F. Benítez Rexach, rehearing, Case No. 65, VI these Dec., 261.)

A notification of an award of a contract accepted by claimant and followed by delivery of manufactured articles constituted an informal contract within the purview of the act of March 2, 1919. (Riverside Metal Co., Case No. 2668, VI these Dec., 993.)

Where it is doubtful whether the Government had an option which it could enforce under a certain contract, it is unnecessary to determine that question under the facts of this case, since if it had such option the issue of a procurement order covering the property affected by

**CONTRACTS—Continued.**

the purported option constituted an acceptance thereof, and if the Government did not have such option the procurement order and the subsequent conduct of the other parties to the contract in acquiescing to the terms of the procurement order and in consenting to an appraisal of the property constituted an acceptance of the offer contained in the procurement order.

Where a contract provides that the Government may purchase all machinery required for the manufacture of rifles and machine guns, such provision is not void for indefiniteness if in the same instrument there is a provision for selection by the Government of such machinery as it desires at prices to be fixed by appraisers to be appointed as therein provided, as the rule of *id certum est quod certum reddere potest* applies. (Russian Remington Rifle Contract Trustees, Case No. 2066, VI these Dec., 920.)

Where claimant had a subcontract to machine forgings for 3-inch shell and was directed by the Government to suspend 3-inch shell production and prepare to handle 75-millimeter shell, and after considerable delay was awarded a contract directly with the United States for the manufacture of 75-millimeter shell, a claim for loss caused by the change in the Government's program should either be presented through the prime contractor or should be based upon the contract for 75-millimeter shell subsequently awarded by the Government, since at the time of the change of program there was no privity of contract between claimant and the United States. The fact that the Government in addition to suspending the prime contractor's production, also notified the subcontractor of the change, does not constitute a novation, nor does it amount to an agreement within the meaning of the act of March 2, 1919. (A. P. Smith Mfg. Co., Case No. 2275, VI these Dec., 157.)

A tentative settlement agreement, which is subject to approval by higher authority, is not binding on the Government until so approved. (South Texas Lumber Co., Case No. 2541, VI these Dec., 369.)

Where claimant, at the suggestion of the Government, offered to devote the entire energies of its factory to Government work, and was later awarded a formal contract to sponge, shrink and dye cloth, which contract was not sufficient to require claimant's entire space which it had provided for Government work, the Government is not obligated under the act of March 2, 1919, to reimburse the claimant for loss sustained in providing for the additional space in the absence of evidence showing that the Government agreed to pay such expense. (Theodore Tiedemann Corp., Case No. 2136, VI these Dec., 694.)

Where claimant had a number of Government contracts in connection with which various Government officers stimulated claimant's production without making any express agreements to reimburse claimant its expenditures thus incurred, claimant is not entitled to relief under the act of March 2, 1919. (Unexcelled Mfg. Co., Cases Nos. 1486, 1908, and 2165, VI these Dec., 682.)

The claimant is not entitled under the act of March 2, 1919, to reimbursement for loss sustained in his efforts to perform an alleged informal contract to furnish the Government a quantity of castor beans, where the evidence fails to show that the Government intended to enter into such a contract. (Cyrus French Wicker, Case No. 1144, VI these Dec., 403.)

**CONTRACTS—Continued.**

Claimant can not be held to the terms of an offer of compromise settlement where same was not accepted and consummated, but in proper case is entitled to recover under the supply circulars and the terms of the proposed settlement will be disregarded. (Winfield Webster & Co., Case No. 2535, VI these Dec., 809.)

*See also* CONTRACTS, RECOMMENDATION; CONTRACTS, CONSIDERATION; CONTRACTS, CONSTRUCTION; JURISDICTION; CONTRACTS, SETTLEMENT.

**CONTRACTS, WRITTEN.**

Where there is an oral agreement between a manufacturer and the Government that claimant will be awarded a contract for the manufacture of a certain number of articles, and it is understood that special machinery will be necessary in order to manufacture such articles and the number of articles to be manufactured is fixed as an inducement for the manufacturer to enter upon the production of such articles, and thereafter a formal contract is entered into covering a portion only of the articles, and on account of the armistice orders for the balance of the number agreed upon are not given, there is no merger of the oral agreement into the written contract. (American Can Co., Case No. 2216, VI these Dec., 896.)

Under the well-known rule that all prior and contemporaneous oral agreements are merged in a written instrument dealing with the same subject matter, there can be no agreement within the meaning of the act of March 2, 1919, in direct conflict with the written agreement signed by the parties. (Brewster & Co., Case No. 632, VI these Dec., 119.)

Where claimant and representatives of the Government make different contentions with reference to their respective rights under a previous contract in negotiating a settlement thereunder, and with full opportunity to obtain counsel and advice, claimant executed the settlement contract, such settlement contract is a binding obligation upon claimant.

Where a claimant with full knowledge of all the facts and with ample time and opportunity for investigation, consultation, and consideration, and after consulting with its attorneys, enters into a contract, such contract will not be abrogated on the grounds of duress. (Cleveland Crane & Eng. Co., Cases Nos. 2309 and 2310, VI these Dec., 94.)

A written contract is presumed to contain the entire agreement between the contracting parties and parol evidence is inadmissible to add to, detract from, or vary its terms; but it is also the rule that either of the parties may show, by parol or otherwise, the existence and terms of an independent agreement as to a matter not covered by the written contract. (Garford Motor Co., Case No. 2740, VI these Dec., 1025.)

The contention of the claimant that it was not advised that the proposed contract would contain a clause authorizing the Government to cancel it under certain conditions is without merit, as it received, read, accepted, and signed the contract and is bound thereby. (A. R. Mosler Co., Case No. 2659, VI these Dec., 1036.)

Where the proposal submitted by claimant contained a stipulation that all taxes thereafter imposed by Congress should be taken care of or paid by the Government, and this stipulation was omitted from the formal contract, which claimant refused to sign or perform until

**CONTRACTS—Continued.**

assured and promised by duly authorized Government officers that the taxes, if imposed, would be taken care of through the medium of a separate agreement, and relying thereon claimant executes and performs said contract and taxes are imposed, an implied agreement arose under the act of March 2, 1919, to reimburse claimant for such taxes. (Pierce-Arrow Motor Car Co., Case No. 2754, VI these Dec., 986.)

All prior and contemporaneous negotiations are presumed to have been merged into the written contract embodying the subject matter of such negotiations: however, parol evidence may be received to explain the real intention of the parties as to any terms of the contract which are ambiguous, provided such evidence may not be admitted for the purpose of endeavoring to create an ambiguity and so ingrafting upon the contract new stipulations nor to contradict those that are plain. (United States Industrial Chemical Co., Case No. 10, VI these Dec., 65.)

A written contract is presumed to contain the entire agreement between the contracting parties, and all preliminary negotiations and agreements are considered as merged therein. (Wisconsin Zinc Co., Case No. 2617, VI these Dec., 690.)

**COST-PLUS CONTRACT.****COSTS.****• COSTS, ADDITIONAL.**

See **CONTRACTS, ADJUSTMENT.**

Where at the time purchase orders are issued for the manufacture of coats and trousers it is contemplated that they be baled for domestic shipment, and prior to their shipment claimant is directed to bale the clothing for overseas shipment and incurs additional expense in so doing, there is an obligation on the part of the Government to reimburse claimant for such additional expense. (Hamilton Carhartt Cotton Mills (Ltd.), Case No. 2246, VI these Dec., 90.)

Where claimant received three contracts for motors—the first order for 2 experimental motors, the second for 1, and the third for 2,000, all at certain fixed prices—in the absence of a separate express agreement to pay additional experimental costs, claimant's rights are defined and limited by his three contracts and no agreement can be implied whereby the Government is obligated to reimburse claimant such additional costs. (Hudson Motor Car Co., Cases Nos. 1626 and 1627, VI these Dec., 398.)

**COSTS, EXPERIMENTAL.**

See **BUSINESS RISK.**

Where the evidence shows an express agreement between the negotiating parties in regard to the cost of experimental work to the effect that the Government representative would recommend the awarding of contracts to claimant if it developed acceptable materials, such express agreement precludes any implied agreement as to reimbursement of such costs. Accordingly, since contracts were recommended in pursuance of the express agreement, and two contracts actually awarded, there is no merit in a claim for the unabsorbed experimental costs based upon an alleged implied agreement to reimburse claimant for all its experimental costs. (E. I. du Pont de Nemours Co., Case No. 2021, VI these Dec., 445.)

**COSTS—Continued.**

Where negotiations between an inventor and the Government relative to camera devices do not culminate in an agreement obligating the Government to reimburse claimant for expense in connection with the development of such devices, claimant is not entitled to recover expense so incurred. (Sherman M. Fairchild, Case No. 504, VI these Dec., 746.)

Where claimant experiments in the manufacture of chemicals with the anticipation of receiving Government orders for its product, the Government is under no obligation to reimburse claimant for its experimental expense in the absence of an agreement express or implied. (Fellows Medical Mfg. Co., Case No. 2504, VI these Dec., 870.)

**COSTS, LEGITIMATE.**

*See* INTEREST.

Where a corporation is organized solely for the purpose of carrying out a manufacturing contract with the Government, there is an obligation on the part of the Government, upon suspension of the contract, to reimburse claimant for such part of the salaries of its executive officers for such time and in such amount as may be reasonably necessary to wind up its business. (Breese Aircraft Co. (Inc.), Case No. 894, VI these Dec., 884.)

Under the act of March 2, 1919, in the settlement of an informal contract, the contractor is entitled to be reimbursed for its unamortized development costs, incurred in performing or preparing to perform the agreement.

A sum paid by claimant to two individuals as a consideration for indorsing its note given as security for a Government loan is not a reimbursable item of cost.

Items of cost attributed to preparation of the claim under a suspended contract are not reimbursable.

In the absence of special agreement, cost resulting from wage increases alleged to have been made by advice of a Government representative is not a reimbursable item of cost. (Chamberlain Machine Works, Case No. 2480, VI these Dec., 242.)

Where the principal part of the time of executive officers is given to the preparation of unfounded claims against this Government, no allowance will be made therefor. (The Maritime Mfg. Co., Case No. 2533, VI these Dec., 626.)

Fees paid lawyers and expert accountants to prepare this claim against the Government are not items of cost under the contract and not authorized by the termination clause and can not be allowed. (A. R. Mosler Co., Case No. 2659, VI these Dec., 1036.)

Under the facts of this case claimant is not entitled to compensation for loss by fire. (The Pentucket Narrow Fabric Mills, Cases Nos. 686 and 2304, VI these Dec., 774 and 781.)

There is no merit in a separate claim for pay-roll expense of employees alleged to have been held at the request of the Government for the performance of a future contract where such contract was subsequently awarded, especially since the contract has been settled and the Government released from all claims thereunder. (Southern Aircraft Co., Case No. 1881, VI these Dec., 2.)

Such expenses for employees are not proper charges under a cost-plus contract. (The J. G. White Eng. Corp., Case No. 1897, VI these Dec., 854.)



## COSTS—Continued.

Under the above circumstances, the salaries and expenses must be directly chargeable to the work in question; hence the expense account of an employee traveling from the main office in connection with settlement of the claim can not be allowed as an item of cost under the contract. (The J. G. White Eng. Corp., Case No. 2452, VI these Dec., 148.)

*See also* CONTRACTS, CONSTRUCTION.

## D.

## DAMAGES.

DAMAGES, UNLIQUIDATED.

## DECISIONS.

DECISIONS, AFFIRMED.

Claim under the act of March 2, 1919, for \$83,701.44, based upon an oral agreement for facilities in connection with a proxy-signed contract for rutile. This board held that there was no oral agreement and that claimant was only entitled to relief under the written contract. Affirmed on appeal to the Secretary of War with the exception of one clause holding that claimant did not contemplate any amortization of the cost of facilities out of the price fixed in the written contract. The determination of this fact is left to the Claims Board, Chemical Warfare Service, to which the claim is now referred for settlement. (For the facts, see the decision of this board, Vol. I, p. 789.) (Buckman & Pritchard (Inc.), Case No. 470, VI these Dec., 815.)

This claim was disposed of by the Board of Contract Adjustment August 12, 1919, by denying relief to the claimant (Vol. I, these decisions, p. 332). Claimant appealed to the Secretary of War, who, upon the 16th day of February, 1920, affirmed the decision of this board. (Industrial Engineering Co., Case No. 297, VI these Dec., 716.)

This claim, under the act of March 2, 1919, was decided adversely to claimant in a decision of this board rendered April 1, 1920. Claimant requested a rehearing, which was held on May 21, 1920, but no additional testimony or evidence was introduced. Held, on careful consideration of the former decision, that claimant is not entitled to relief and that the former decision should stand without change. (For former decision, see Vol. IV, p. 794.) (International Harvester Co., Case No. 1563, VI these Dec., 1.)

This claim was disposed of by the Board of Contract Adjustment on the 3d day of April, 1920 (Vol. IV, these Decisions, p. 862), by which it was held that claimant was entitled to recovery in part. Claimant appealed to the Secretary of War, who, upon the 3d day of June, 1920, affirmed the decision of this board. (Littauer Bros., on appeal, Case No. 2368, VI these Dec., 693.)

Claim under the act of March 2, 1919, for \$2,839.62 based upon an implied agreement relating to the construction of crossovers. By its decision of June 1, 1918, claimant was denied relief. Claimant requested a rehearing, which was granted, but no additional testimony was introduced at the rehearing. Held, on reconsideration of the record, the former decision denying relief is affirmed. For the facts, see the prior decisions of this board (Vol. V, p. 174). (New York Central R. R. Co., Case No. 2605, VI these Dec., 501.)

**DECISIONS—Continued.**

This case was originally before this board as a class B claim in Case No. 2257, and on January 27, 1920, this board rendered its decision and issued certificate Form C, holding, however, that Mr. Soderling had already been paid for his own services. The case was returned to this board under General Order 103 for determination of a dispute between the Claims Board, Air Service, and the New York office of the Liquidation Division of the Air Service, the latter contending that this board was in error in finding that claimant had been paid for his personal services. The original decision of this board is affirmed and the relief now sought by claimant is denied. For the original decision of this board see Volume III, page 206. (Walter Soderling (Inc.), Case No. 2822, VI these Dec., 677.)

This claim was originally heard by the board on May 12, 1920. (Vol. V, p. 304, these Decisions.) A decision was made at that time denying claimant relief. On a rehearing had on June 21, 1920, the former decision of the board was adhered to. The syllabus written for the former opinion applies to the recent one. The former opinion contains a statement of facts which is not given in the last. (Standard Textile Products Co., Case No. 2455, VI these Dec., 680.)

**DECISIONS, REVERSED.**

This case upon rehearing was reversed in accordance with the request of the special member of the War Department Claims Board as contained in the memorandum to this board. By the recent decision the board follows the law announced in the case of the Specialty Knit Goods Manufacturing Co., No. 341, decided on June 21, 1920. The facts in the case will be found in printed volume No. 2 of the Decisions, page 95. (Farragut Textile Mfg. Co., reconsideration, Case No. 246, VI these Dec., 527.)

Claim under the act of March 2, 1919, for \$11,910.67, based upon an oral agreement in relation to a dry-cleaning plant. This board in its decision of April 3, 1920, held that claimant was entitled to relief. On April 24, 1920, this claim, together with case No. 1630, same claimant, was returned to this board pursuant to a resolution of the War Department Claims Board requesting that this board reconsider its decision. The case was accordingly reconsidered and further testimony taken. It is now held, that claimant is not entitled to relief since there was no agreement within the meaning of the act of March 2, 1919. For the facts, see the prior decision of this board (Vol. IV, p. 977). (Model Steam Laundry, Case No. 1767, VI these Dec., 154.)

**DEFAULT, CANCELLATION FOR.****DEPRECIATION OF PLANT EQUIPMENT.****DIRECTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACTS.**

*See* CONTRACTS, IMPLIED.

**DISPUTE UNDER CONTRACT EXECUTED IN MANNER PRESCRIBED BY LAW.**

*See* JURISDICTION.

**DOCUMENTS INCORPORATED IN CONTRACT BY REFERENCE.****DURESS.**

*See* CONTRACTS, WRITTEN.

**E.****ENGINEERING AND DEVELOPMENT EXPENSES.  
EVIDENCE.**

*See* **CONTRACTS, WRITTEN.**

Where the claimant's evidence was to the effect that Government officer made an oral agreement with claimant for 5,000 airplane propellers and the Government officer denies this and says the agreement was for 1,000 only and is corroborated by letters written by the claimant, there was a failure of proof and no contract was established under the act of March 2, 1919. (American Sash & Door Co., Case No. 251, VI these Dec., 121.)

Where claimant's witness testifies that a certain Government representative told him that claimant was to receive a clothing contract and should acquire necessary facilities for the performance thereof and the Government representative's testimony contradicts claimant's witness, the disputed question of fact may be determined by considering the surrounding circumstances and the probabilities arising from such circumstances. (J. Ferber, Case No. 2685, VI these Dec., 419.)

Where there are apparent errors of calculation in a void bill of sale showing the result of the work of the appraisers of certain machinery purchased by the Government of claimant and subsequently an instrument purporting to correct the bill of sale is drawn up and approved, such instrument, if the calculations therein are correct, constitutes evidence of the operation and carrying out of the agreement between the parties and it should be used by the Claims Board in determining the rights of claimant to compensation. (Russian Remington Rifle Contract Trustees, Case No. 2066, VI these Dec., 920.)

Where the claimant's witness testified that he was authorized and directed by a Government officer to incur additional expense by employing overtime labor and shipping by express instead of freight and this is denied by the Government officer, who had no authority to contract, and who says he merely urged haste, there is not sufficient evidence to establish an agreement under the act of March 2, 1919. (Westinghouse Electric & Mfg. Co., Case No. 2584, VI these Dec., 542.)

A number of claims disallowed because not pertaining to work or supplies under the contract, or not supported by sufficient evidence; others allowed as proper. (The J. G. White Eng. Corp., Case No. 1932, VI these Dec., 201.)

*See also* **PROCEDURE.**

**EXCESS MATERIAL.**

*See* **BUSINESS RISK.**

**EXPENDITURES IN ANTICIPATION OF CONTRACT.**

*See* **CONTRACTS, ANTICIPATION.**

**EXPENSES.**

**EXPENSES AFTER NOVEMBER 12, 1918.**

*See* **JURISDICTION.**

**EXPENSES, EXPERIMENTAL.**

*See* **COSTS, EXPERIMENTAL.**

**EXPENSES, EXTRA.**

*See* **COSTS, LEGITIMATE.**

**EXPENSES—Continued.****EXPENSES IN ANTICIPATION OF CONTRACT.**

*See* **CONTRACTS, ANTICIPATION.**

**EXPENSES, OVERHEAD.****EXPENSES, REIMBURSEMENT.**

*See* **REIMBURSEMENT.**

**EXPERIMENTAL COSTS.**

*See* **COSTS, EXPERIMENTAL.**

**EXPRESSION OF OPINION.****EXTRA EXPENSE.**

*See* **EXPENSES, EXTRA.**

**EXTRA MATERIAL.**

**EXTRA MATERIAL AS RESULT OF GOVERNMENT REQUIREMENTS.**

**F.****FACILITIES.**

**FACILITIES, Agreement to Pay Amortization On.**

**FACILITIES, AMORTIZATION.**

*See* **AMORTIZATION.**

**FACILITIES, INCREASED.**

*See* **CONTRACTS, ANTICIPATION; CONTRACTS, CONSTRUCTION.**

**FACILITIES, SPECIAL.**

*See* **CONTRACTS, CONSTRUCTION.**

**FACILITIES, UNAMORTIZED.****FAIR VALUATION.****FORMAL CONTRACT.**

*See* **CONTRACTS, FORMAL.**

**G.****GENERAL ORDER 103.**

Under the provisions of G. O. 103 it is the duty of this board to advise the Secretary of War as to his rights and obligations where property is taken under the national defense act and to suggest what steps should be taken for the enforcement of his rights or the discharge of his obligation in those cases not handled under that act by the War Department Board of Appraisers. (Seaboard Chemical Co., Case No. 1679, VI these Dec., 752.)

**GOVERNMENT.****GOVERNMENT CONTROL.**

Where it appears that the decline in price causing the loss occurred prior to and independent of Government control, there is no liability on the Government. (Mill Products Corp. & Omnia Commercial Co., Cases Nos. 737 and 748, VI these Dec., 55.)

*See also* **CONTRACTS, WHAT CONSTITUTES.**

**GOVERNMENT NEEDS, REPRESENTATION.****I.****IMPLIED CONTRACT.**

*See* **CONTRACTS, IMPLIED.**

**INCORPORATION OF DOCUMENTS IN CONTRACTS BY REFERENCE.****INCREASED COST OF PRODUCTION.****INCREASED FACILITIES.**

*See* **FACILITIES, INCREASED.**

**INITIAL UNABSORBED OVERHEAD EXPENSES.****INSPECTION, MISSING PARTS.**

**INSTRUCTIONS.**

**INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.**

*See* **CONTRACTS, IMPLIED.**

**INTEREST.**

Where the claimant borrowed money from the War Credits Board and paid interest on account thereof, such interest is not a proper claim under the suspended contract herein, because its payment was not provided for in the termination clause nor otherwise contracted for. (A. R. Mosler Co., Case No. 2659, VI these Dec., 1036.)

Interest may be allowed on capital invested in indirect materials under Supply Circular No. 19, section C. (New York Air Brake Co., Case No. 2060, VI these Dec., 1019.)

*See also* **COSTS, LEGITIMATE.**

**J.****JURISDICTION.**

*See* **CONTRACTS, WHAT CONSTITUTES.**

The Secretary of War has no authority to adjust a claim under an informal contract not coming within the provisions of the act of March 2, 1919. (Aeronautical Equipment (Inc.), Case No. Sales BCA-17, VI these Dec., 577.)

In order to be effective in terminating a contract in the sense of depriving the Secretary of War of jurisdiction, a cancellation must be accepted or acquiesced in by the contractor. (Aurora Door Hanger & Specialty Co., Case No. 1617, VI these Dec., 547.)

The Secretary of War has no authority to adjust or settle a claim for damages based upon a breach by the Government of a formal contract which has been fully performed. (F. A. Brady (Inc.), Case No. Sales BCA-3, VI these Dec., 234.)

Where a formal contract has been fully performed the only function of this board is to determine doubts and disputes in reference to performance in order that such determination may be certified to the Department of the Treasury for the information of the comptroller. the Secretary of War having no authority to make settlement. (Breese Aircraft Co. (Inc.), Case No 2456, VI these Dec., 884.)

This board is without jurisdiction of a claim under the act of March 2, 1919, first presented to an agency of the Government on May 21, 1920. (W. N. & S. P. Burns, Case No. 2739, VI these Dec., 266.)

Where surplus property is sold by the Quartermaster General's Department at public auction according to catalogue and upon exhibition of samples, and no contract within the meaning of section 3744, Revised Statutes, is executed, and the Quartermaster General has prescribed no regulations for the sale of surplus property under 6853b, Compiled Statutes, the contract of sale is informal, and since such sale does not come within the purview of the act of March 2, 1919, the Secretary of War has no jurisdiction to adjust a claim for breach of warranty arising from such sale. (Canton Clothing Mfg. Co., Case No. Sales BCA-6, VI these Dec., 224.)

A class B claim filed with the Board of Contract Adjustment as an original tribunal on May 1, 1920, is filed too late to be considered under the act of March 2, 1919.

The Board of Contract Adjustment has only jurisdiction in settlement cases arising under formally executed contracts where the contractor and contracting officer have been unable to agree on a settlement thereunder. (Carlisle Commission Co., Case No. 2663, VI these Dec., 174.)

**JURISDICTION—Continued.**

Where the Government sells goods at public auction by sample and the auction catalogues require the goods to be removed from the Government warehouse in 30 days from date of sale and claimant's bid is accepted by letter from duly authorized agents of the Quartermaster General's Department, the contract is an informal one, since the Quartermaster General has prescribed no regulations for the sale of surplus property under section 6853b, Compiled Statutes, and if the goods sold do not comply with the sample or with the description in the catalogue and claimant has put it out of its power to rescind and return the goods, claimant, if it has a remedy against the Government, must pursue it outside of the War Department, as the Secretary of War has no jurisdiction to adjust a claim for unliquidated damages on account of a breach of warranty by the Government, under an informal contract not within the provisions of the act of March 2, 1919. (Classic Mills (Inc.), Case No. Sales BCA-2, VI these Dec., 131.)

The Secretary of War has no jurisdiction over a claim under a validly executed contract which has been terminated by completion. He is also without jurisdiction over a claim for remission of liquidated damages which have accrued to the United States. (Citing Hawthorne case, 11 Comptroller's Decisions, 113.) (Cleveland Machinery & Supply Co., Case No. 295, VI these Dec., 598.)

The Secretary of War has no authority to adjust a claim for damages based upon the breach of an informal contract made after November 12, 1918. (Charles Cohen, Case No. Sales BCA-7, VI these Dec., 141.)

Agreements by agencies outside the War Department and not for a War Department purpose. Where the claimant furnished steel bars to a contractor, who was building barges for the United States Railroad Administration, and there was no contractual relation between claimant and the Government, and there is no evidence to show that the Railroad Administration was acting as the agent of the Secretary of War or of the President for War Department purposes, or that the barges were intended or used for War Department purposes, this board is without jurisdiction to adjust said claim. (Concrete Steel Co., Case No. 2674, VI these Dec., 340.)

The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims. (Cowell & Co., Case No. 2762, VI these Dec., 610.)

When a claim under the act of March 2, 1919, is not presented to or filed with any department or officer of the Government until after June 30, 1919, there was no authority in the Secretary of War, or in the Board of Contract Adjustment, to make settlement or adjustment of said claim. (J. V. Crane and George Colebank, Cases Nos. 2680 and 2673. VI these Dec., 498.)

Where claimant has a formal contract to perform experiments for the Government in connection with drop bombs, in which a maximum price is fixed, and after the experimental work contemplated in the contract has been fully completed claimant is orally directed by the Government to perform additional experimental work and these oral directions are confirmed by letters from the Engineering Bureau of the Ordnance Department, claimant is entitled to recover for such



**JURISDICTION—Continued.**

additional experimental expense as it may have incurred under such directions which were given prior to November 12, 1918, but as to certain expense included in the claim not ordered until after November 12, 1918, the Secretary of War is without jurisdiction to adjust. (E. I. Du Pont de Nemours Co., Case No. 2568, VI these Dec., 868.)

Inasmuch as section 3477, Revised Statutes, provides that any assignment of a claim against the United States, prior to the allowance of such claim and ascertainment of the amount due and issuing of warrant therefor, shall be null and void, this Board is without jurisdiction to entertain the claim of an assignee, which was assigned prior to the allowance and prior to the ascertainment of the amount due. (Eikenberry-Fitzgerald Co., Case No. 2381, VI these Dec., 227.)

The act of March 2, 1919, contains no requirements that claims thereunder must be presented in writing. The word "presentation" means doing some act in the presence of another, and in the absence of express provision in the act for the presentation of claims in writing an oral presentation of a claim to the War Department prior to June 30, 1919, is a sufficient presentation within the meaning of said act. (Employees of the Minneapolis Steel & Machinery Co., Case No. 2099, VI these Dec., 835.)

The Secretary of War, and this Board when designated, has power to settle and adjust a formal contract under section 3 of the act of March 2, 1919, upon such terms as he or it may determine to be in the interest of the United States, and to be equitable and fair, although the contract has been performed or terminated in some other manner. (Eliseo Espallat, Case No. 2666, VI these Dec., 302.)

Rendering an itemized bill or invoice to the Bureau of Aircraft Production prior to June 30, 1919, is a sufficient presentation of a claim under the act of March 2, 1919. (Ford Motor Co., Case No. 2638, VI these Dec., 134.)

Where claimant's formal contract to purchase the waste material at Camp Dix was fully performed on the part of the claimant and the Government and had expired by its own limitation, the Board of Contract Adjustment has no jurisdiction to adjust a claim growing out of such contract. (General Manufacturing Co., Case No. 2613, VI these Dec., 329.)

Where a formal contract has been fully performed, or has expired by its own limitation, the Secretary of War has no jurisdiction to adjust such contract, or to make a supplemental agreement thereunder. (General Manufacturing Co., Case No. 2614, VI these Dec., 256.)

The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims. (Haehl Bros., Case No. 2732, VI these Dec., 620.)

The Board of Contract Adjustment will not consider a claim arising under the act of March 2, 1919, that was not filed within the time limit for filing claims as prescribed by the act, to wit, on or before June 30, 1919. (Young Hester, Case No. 2737, VI these Dec., 571.)

Where a claim, under the act of March 2, 1919, is filed subsequent to June 30, 1919, the Secretary of War has no jurisdiction thereof. (Bert Hise, Case No. 2690, VI these Dec., 172.)

**JURISDICTION—Continued.**

The Secretary of War has no jurisdiction of a claim for damages for breach of warranty based on an informal contract of sale not within the terms of the act of March 2, 1919. (Interstate Grocer Co., Case No. Sales BCA-10, VI these Dec., 186.)

Where a claim grows out of a formal contract claimant has no remedy under the act of March 2, 1919. (Ireton Bros., Case No. 2669, VI these Dec., 350.)

The Board of Contract Adjustment will not consider a claim arising under the act of March 2, 1919, that was not filed within the time limit for filing claims as prescribed by the act, to wit, on or before June 30, 1919. (Henry Knox and O. O. McWilliams, Cases Nos. 2763 and 2770, VI these Dec., 573.)

The Secretary of War has no authority to adjust a claim for damages arising from breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919, either by the payment of money or the substitution of other property. (H. Miller & Co., Case No. 13, VI these Dec., 540.)

Under the act of March 2, 1919, the Secretary of War is given original jurisdiction to adjust pay, and discharge informal agreements falling within the terms of said act, to the exclusion of other agencies of the Government, and his jurisdiction is not ousted by attempted determination of claims arising under such agreements by administrative agencies of the Government outside of the War Department. (Morgan Engineering Co., Case No. 2454, VI these Dec., 37.)

The Secretary of War has no power to settle a claim arising under a formally executed contract which has been fully performed or which has expired by regular efflux of time.

Where a formal contract is terminated by breach on the part of the contractor, the Secretary of War is without power to settle or adjust any claim arising under said contract. (National Contracting Co., Case No. 2461, part 1, VI these Dec., 285.)

Under the act of March 2, 1919, a claimant is not entitled to be reimbursed speculative or possible losses. (The New York & Pennsylvania Railroad Co., Case No. 2800, VI these Dec., 1031.)

Where a claim under the act of March 2, 1919, is not presented to any agency of the Government prior to June 30, 1919, the Secretary of War has no jurisdiction thereof, under said act. (W. T. Nixon, Case No. 2686, VI these Dec., 189.)

This board has no jurisdiction of a claim under a validly executed and fully performed contract. (Pennsylvania Railroad Co., Case No. 2493, VI these Dec., 703.)

Where a validly executed contract has been fully performed, a claim thereunder can not be determined by the War Department, but must be settled by the Treasury Department or the courts. (William B. Perry, doing business as W. B. Perry Electric Co., Case No. 2660, VI these Dec., 466.)

The Secretary of War has no jurisdiction to adjust a validly executed contract which has been terminated by performance, breach, or expiration of time for performance. (W. B. Price and Ben F. Vogt, Case No. 2615, VI these Dec., 251.)

Under a validly executed contract for the purchase of waste material accruing at a cantonment during a certain period, this board is with-

**JURISDICTION—Continued.**

out jurisdiction of a claim for unliquidated damages based upon alleged failure of the Government to turn over all such waste material. The case of Henry Knight & Sons, No. 1736, relied on by claimant, is distinguished because in that case after the dispute arose the parties agreed that the Government would either segregate the disputed material or hold the money received therefor as a stakeholder, pending determination of the dispute. (W. B. Price and Ben F. Vogt, Case No. 2615, VI these Dec., 251.)

Where the claimant had a formal contract for the purchase and removal of waste material from an Army camp, which has been terminated by regular expiration of time and been fully performed by both parties, the Secretary of War has no jurisdiction to settle a claim that claimant had not received all the material he was entitled to, which was first asserted 20 months thereafter. Case of Henry Knight & Son distinguished. (Products Manufacturing Co., Case No. 2616, VI these Dec., 364.)

Neither the Board of Contract Adjustment nor the Secretary of War have power to adjust a claim on an informal agreement under the act of March 2, 1919, where the claim was not presented until May 18, 1920. (A. M. Ratto, Case No. 2687, VI these Dec., 184.)

The Secretary of War has no authority to adjust a claim for damages based upon a breach by the Government of an informal contract not coming within the provisions of the act of March 2, 1919. (L. F. Robertson & Sons (Inc.), Case No. B. C. A. 14, VI these Dec., 431.)

The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims. (C. F. Roesner; Price & Trammell; F. E. Clayton; August Herring; B. J. Clayton; Grimes & Cope; E. M. Jones; Parker & Alexander; A. C. Herring; Mrs. L. R. Brookshire; Will Hale; A. V. Livingston; G. C. Ran, Cases Nos. 2761, 2764, 2765, 2766, 2767, 2769, 2771, 2772, 2773, 2774, 2775, 2786, and 2808, VI these Dec., 507.)

In order to recover for expenditures or services under the act of March 2, 1919, there must be an agreement, either express or implied, and there can be no recovery for services gratuitously rendered and for which no compensation was expected. (R. U. V. Co., Case No. 1664, VI these Dec., 515.)

Where a claim is not presented prior to June 30, 1919, this board can grant no relief under the act of March 2, 1919.

A quasi contract is not capable of amendment, and therefore it is not within the power of the Secretary of War or this board to authorize a settlement contract in order to compensate claimant for its loss in the performance of such a contract.

The fact that this board may grant relief under the act of March 2, 1919, where the contract falls within the limitations of that act in cases involving compulsory orders under the national defense act of June 3, 1916, issued prior to November 12, 1918, where the claim is presented prior to June 30, 1919, does not exclude this board from granting relief to claimant without resorting to the act of March 2, 1919, in cases where the claim was not presented as required within the time limit of said act and from giving relief under the act of June 3, 1916. (Seaboard Chemical Co., Case No. 1679, VI these Dec., 752.)

**JURISDICTION—Continued.**

Where a validly executed contract has been fully performed, the Secretary of War has no jurisdiction of a claim for reimbursement of loss sustained by reason of alleged unwarranted rejection of articles by Government inspectors. (Southern Aircraft Co., Case No. 1881, VI these Dec., 2.)

Where, upon the suggestion of this board, arbitrators under a formally executed contract have corrected a mistake in the document reciting their award made in accordance with the terms of a labor-dispute clause in the contract so as to allow claimant an increase in the unit price under such contract, there remains no doubt or dispute, under G. O. 103, for this board to determine.

Neither this board nor the Secretary of War has power to pay or order payment of moneys under terminated formal contracts. The power of the War Department in such matters is limited to approval and certification for payment by the Treasury Department, and such approval and certification are not ordinarily functions of this board. (Stowe & Woodward Co., rehearing, Case No. 545, VI these Dec., 742.)

Where claimant seeks reimbursement of various items of cost incurred in the performance of a number of contracts all of which have either been completely performed and paid for or partially performed and settled, there can be no recovery under such contracts. (Unexcelled Mfg. Co., Cases Nos. 1486, 1908, and 2165, VI these Dec., 682.)

Where a claim under the act of March 2, 1919, is not presented to or filed with any department or officer of the Government until after June 30, 1919, there was no authority in the Secretary of War or the Board of Contract Adjustment to make settlement or adjustment of said claim. (W. H. Vaughn, Case No. 2720, VI these Dec., 270.)

The Secretary of War has no authority to adjust a claim for damages based upon the breach of an informal contract made after November 12, 1918. (Louis S. Wandell & Co., Case No. B. C. A. 8, VI these Dec., 415.)

The claimant is not entitled under the act of March 2, 1919, to reimbursement for loss sustained in the performance of a contract to which the United States Government was not a party. (War Crete Shipbuilding Co., Case No. 342, VI these Dec., 963.)

Where the claimant entered into a formal contract for the construction of concrete boats and was required to give a bond for the faithful performance thereof, which it failed to do, and the contract was revoked and canceled because of such failure, this Board has no jurisdiction, because the contract was terminated by breach of the claimant.

In such case, if, as claimed, the Government waived the requirements of the performance bond and afterwards revoked and canceled the contract, this Board has no jurisdiction, because the contract was terminated by breach on the part of the Government. (West Coast Shipbuilding Co., Case No. 2296, VI these Dec., 433.)

Under a validly executed contract for the sale of certain material by the Government to a contractor the function of the Secretary of War is complete when the material has been delivered. Accordingly this Board has no jurisdiction of a claim for payment of freight equalization provided in the contract, which is a matter for the Treasury Department to adjust. (Western Pipe & Machinery Co., Case No. B. C. A. 9, VI these Dec., 337.)

**JURISDICTION—Continued.**

The Secretary of War has no jurisdiction of a claim under the act of March 2, 1919, presented after the expiration of the period prescribed in that act for the filing of such claims. (C. C. Wilkins, Day Cage, J. C. Bumgardner, J. E. & Theo. Lyckman, and Leonard & Smith, Cases Nos. 2738, 2789, 2795, 2796, and 2803, VI these Dec., 575.)

This Board has no jurisdiction of a claim under the act of March 2, 1919, which was first presented on May 24, 1920. (T. M. Windham, Case No. 2734, VI these Dec., 401.)

*See also* CONTRACTS, REFORMATION.

**L.****LABOR.**

**LABOR AND MATERIALS USED IN REPAIR.**

**LABOR DISPUTES CLAUSE.**

*See* CONTRACTS, CONSTRUCTION.

**LACK OF CONSIDERATION IN CONTRACTS.**

*See* CONTRACTS, WHAT CONSTITUTES.

**LATE DELIVERIES.**

*See* WAIVER.

**LOSS NOT SUSTAINED.**

Where claimant has incurred no expenses and made no commitments between the date of an oral order to proceed with the manufacture of raincoats and the date he learns that the oral contract has been suspended, there is no obligation upon the Government under the act of March 2, 1919. (Lester Austern, rehearing, Case No. 266, VI these Dec., 343.)

Where the claimant bought goods from the Government by sample and description and receives the goods and retains them, although they do not come up to sample, sells them and suffers no damage, can not have a rescission of the contract. (Charles Cohen, Case No. Sales BCA-7, VI these Dec., 141.)

Where the proof shows that a subcontractor could have canceled its orders for material without loss but retained it and used it in its private business, it had no claim for reimbursement for loss, if any, on suspension or cancellation of its contract with the prime contractor. (Philadelphia Boiler Works, under Foundation Co., Case No. 2501, VI these Dec., 198.)

**M.****MATERIAL.**

**MATERIALS PURCHASED IN ANTICIPATION OF ORDERS.**

*See* CONTRACTS, ANTICIPATION.

**MEASURE OF ADJUSTMENT.**

*See* CONTRACTS, ADJUSTMENT.

**MEETING OF MINDS.**

*See* CONTRACTS, WHAT CONSTITUTES.

**MERGER.**

Where a letter was addressed claimant directing that in sawing lumber for airplane propellers it should be so done as to save the part left for gunstock flitches and claimant agreed thereto and subsequently accepted a contract for 100,000 feet of airplane propeller lumber, the latter does not constitute a separate contract, but is merged in the contract; the gunstock flitches are incidental merely, and on suspension of the contract claimant is entitled to be reimbursed

**MERGER—Continued.**

only for such material as was necessary to fill the contract for airplane propellers. (J. V. Stimson & Co., Case No. 740, VI these Dec., 422.)

**MERGER OF ORAL IN WRITTEN CONTRACTS.**

See CONTRACTS, WRITTEN.

**METHOD OF ADJUSTMENT.**

See CONTRACTS, ADJUSTMENT.

**MISTAKE.****MISTAKE, MUTUAL.**

See CONTRACTS, REFORMATION.

**MUTUAL MISTAKE.**

See CONTRACTS, REFORMATION.

**N.****NATIONAL WAR LABOR BOARD.**

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

**NEGOTIATIONS.****NEGOTIATIONS MERGED INTO WRITTEN CONTRACT.**

See CONTRACTS, WRITTEN.

**NEGOTIATIONS ONLY.**

See CONTRACTS, ANTICIPATION; CONTRACTS, WHAT CONSTITUTES.

**O.****ORAL CONTRACTS.**

See CONTRACTS, WRITTEN.

**ORAL ORDERS.**

See CONTRACTS, IMPLIED.

**ORDERS, ADDITIONAL.**

See EXPENSES, EXTRA.

**ORDERS, ANTICIPATED.**

See CONTRACTS, ANTICIPATION.

**OVERHEAD EXPENSE.****OVERRUN BEYOND CONTRACT ALLOWANCE.****P.****PART PERFORMANCE.****PASSING OF TITLE.****PAYMENT.**

See CONTRACTS, ADJUSTMENT; PROCEDURE.

**PERFORMANCE, SUBSTANTIAL.**

See JURISDICTION.

**PLANT EQUIPMENT.****PLANT EQUIPMENT, DEPRECIATION.**

See AMORTIZATION.

**PLANT AND EQUIPMENT, "SPECIALLY PROVIDED."****PREPARATION.****PREPARATION FOR AN ANTICIPATED CONTRACT.**

See AMORTIZATION.

**PREPARATION TO PERFORM CONTRACT.**

See CONTRACTS, ANTICIPATION.

**PRESENTATION OF CLAIM.**

See JURISDICTION.

**PRIVITY OF CONTRACT.**

See CONTRACTS, WHAT CONSTITUTES.



## PROCEDURE.

Where a claim is originally filed by officers of a trade-union as agents for certain employees only for increased wages awarded by the National War Labor Board other employees affected by such award may intervene. (Employees of the Minneapolis Steel & Machinery Co., Case No. 2099, VI these Dec., 835.)

The formal contract and the informal contract involved herein will be settled on the principles and rules governing the settlement of informal contracts, and claimant is given further opportunity to show his expenditures, commitments, and other allowable costs. (Eliseo Espallat, Case No. 2666, VI these Dec., 302.)

Where an appeal is taken to the Secretary of War from the decision of this Board only such questions will be considered as are raised by such appeal, and in this case the decision of this Board on rehearing, that it had no jurisdiction to determine a controversy with reference to rags and clippings, will not be passed upon by the Secretary of War.

Where the Secretary of War decides that claimant is entitled to recover a bonus provided in a contract for the manufacture of uniform coats from materials furnished by the Government, and there is a dispute as to whether the Government or the contractor is entitled to the rags and clippings, which has not been decided, payment will not be made until such dispute is determined. (Heidelberg, Wolff & Co., Case No. 30, VI these Dec., 721.)

A claim for reimbursement on account of additional facilities under a suspended contract containing no special provisions regarding facilities is to be adjusted under Supply Circulars Nos. 111 and 19. (R. H. Long Co., Case No. 2520, VI these Dec., 803.)

Where claimant is engaged in the manufacture of acetone, ketone, and acetic anhydride, in the production of which acetate of lime and wood alcohol are required, and which are delivered to claimant by plants producing said products for the Government under compulsory order No. 326 B/C, issued by the President through the War Industries Board under the national defense act, and claimant operates its plant under said order, and at the time of the termination thereof has on hand acetate of lime and bags containing same and certain quantities of ethyl methyl ketone, the Board will not limit its adjustment to the items claimed, but will consider in its adjustment all of the products affected by the compulsory order which claimant had on hand at the time the order was terminated. (Melville-Corbett Co., Case No. 197, VI these Dec., 735.)

The Comptroller of the Treasury has the final decision as to the disbursement of public funds before suit. (Stowe & Woodward Co., rehearing, Case No. 545, VI these Dec., 742.)

The contractor, under a cost-plus contract, must present properly signed receipts or other undoubted evidence as to the correctness of its pay-roll accounts, and where proper proof is not presented, due to claimant's inefficient accounting system, such items will be disallowed. (J. G. White Engineering Corp., Case No. 1932, VI these Dec., 201.)

*See also* EVIDENCE.

## PRODUCTION, STIMULATION. .

**PROFIT.**

In an adjustment under the act of March 2, 1919, a claimant is not entitled to any profit. (Alvord & Swift, Case No. 2622, VI these Dec., 327.)

**PROFITS, PROSPECTIVE  
PROMISE.**

*PROMISE OF CONTRACT.*

**PROSPECTIVE PROFITS.****PROXY-SIGNED CONTRACTS.**

*See CONTRACTS, FORMAL.*

**Q.****QUANTUM MERUIT.****QUANTUM VALEBAT.****R.****RECOMMENDATION.**

*See CONTRACTS, RECOMMENDATION.*

**RECOMMENDATION DOES NOT CONSTITUTE A CONTRACT.**

*See CONTRACTS, WHAT CONSTITUTES.*

**RECOMMENDATION OF CONTRACT.**

*See CONTRACTS, RECOMMENDATION.*

**RECOMMENDATION OF AWARD.**

*See CONTRACTS, WHAT CONSTITUTES.*

**RECOVERY FOR REJECTED ARTICLES IN EXISTENCE.****REFORMATION.**

*See CONTRACTS, CANCELLATION.*

In order to justify the reformation of a contract on the grounds of mutual mistake the testimony must be clear and cogent and must establish a mistake of a fact having a present or past existence and must show that at the time of the execution of the contract the parties intended to say a certain thing and by mistake expressed another. (Cleveland Crane & Eng. Co., Cases Nos. 2909 and 2310, VI these Dec., 94.)

Where a claimant signs a release of a written agreement under the mistaken notion, shared in by the representative of the Government, that it retains its rights under a prior oral agreement which was as a matter of law merged by the writing, there can be no reformation of the instrument containing the release on the ground of a mutual mistake of law. (Wisconsin Zinc Co., Case No. 2617, VI these Dec., 690.)

**REIMBURSEMENT.**

*See CONTRACTS, ADJUSTMENTS; BUSINESS RISK.*

Where a representative of claimant made a trip to Washington at the request of the Government and also to Boston, both of which trips were for the purpose of informing the claimant as to the manufacture and construction of a machine for which claimant contemplated taking contracts, and contracts are thereafter entered into, there is no obligation on the part of the Government to reimburse claimant for the expense of said trips in the absence of an agreement, express or implied. (Fergus Motors of America (Inc.), Case No. 2566, VI these Dec., 230.)

**RELEASE OF GOVERNMENT.**

*See* **CONTRACTS, SETTLEMENT.**

On a claim based on an agreement to buy "seconds" at a discount, such "seconds" to apply on the total number of articles to be manufactured under the contract, relief must be denied where claimant has not only released the Government from all claims under the contract but has also been compensated for the small portion of the contract which had not been completed at the time of its suspension. (Chalmers Knitting Co., Case No. 456, VI these Dec., 595.)

Although claimant may have advised Government officers that she had made no commitments for the necessary yarn to fill her contracts and had signed a statement that she was willing to accept cancellation without claim for loss, these statements would not amount to a release of the claim if in fact commitments and expenditures had been made on the strength of the contract and such statements were made in ignorance and under misapprehension of claimant's rights. (The Pentucket Narrow Fabric Mills, Cases Nos. 686 and 2304, VI these Dec., 774 and 781.)

Where a supplemental agreement in settlement of a formal contract contains a general release of all demands and claims growing out of the original contract, the contractor is barred from recovery on a supplemental claim for continuing expenses accruing after execution of the release but growing out of the original contract. (Raymond Engineering Corp., Case No. 2470, VI these Dec., 510.)

Where claimant entered into a cancellation agreement of a formal contract which contained a general release of the Government of all claims arising under the canceled contract, this constitutes a complete release of the Government on all claims arising from or founded on preliminary negotiations which were merged in the formal written contract. (Wisconsin Zinc Co., Case No. 2617, VI these Dec., 690.)

**REPAIRS.****REPRESENTATION.**

**REPRESENTATION OF GOVERNMENT NEEDS.**

**REPRESENTATION REGARDING FURTHER ORDERS.**

**REVISED STATUTES.**

*See* **CONTRACTS, FORMAL.**

**REVISED STATUTES, SECTION 3477.****REVISED STATUTES, SECTION 3744.**

*See* **JURISDICTION.**

**RIGHTS.**

**RIGHTS OF PARTIES.**

*See* **CONTRACTS, CONSTRUCTION.**

**S.****SALARIES.**

*See* **COSTS, LEGITIMATE.**

**SECRETARY OF WAR, JURISDICTION.**

*See* **JURISDICTION.**

**SETTLEMENT CONTRACTS.**

*See* **CONTRACTS, SETTLEMENT.**

**SPECIAL FACILITIES.**

*See* **CONTRACTS, CONSTRUCTION.**

**SPECIFICATIONS.**

**SPECIFICATIONS, CHANGE.**

*See* **CONTRACTS, IMPLIED.**

**STIMULATION OF PRODUCTION.****SUBCONTRACT MADE BY GOVERNMENT ORDER.****SUBCONTRACTORS.**

*See* **CONTRACTS, WHAT CONSTITUTES.**

**SUSPENDED CONTRACT.**

*See* **CONTRACTS, ADJUSTMENT.**

**SUSPENSION.**

**SUSPENSION AND REIMBURSEMENT OF CONTRACT.**

*See* **CONTRACTS, SUSPENSION.**

**SUSPENSION OR CANCELLATION.**

**T.****TERMINATION.**

**TERMINATED PROXY-SIGNED CONTRACT.**

**TERMINATION CLAUSE, CONSTRUCTION.**

*See* **CONTRACTS, CONSTRUCTION.**

**TERMINATION OF CONTRACT.**

*See* **CONTRACTS, TERMINATION.**

**TIME LIMIT FOR FILING CLAIMS.**

*See* **JURISDICTION.**

**TITLE PASSING.****TORTS.**

*See* **JURISDICTION.**

A corporation is liable for the torts of its agents acting within the scope of their authority, and it makes no difference that the torts constitute a crime, since the old doctrine that felony merges a tort is no longer the law. It is immaterial that the proceeds of the thefts went to the conspirators and not to the corporation. (Horowitz & Moskowitz (Inc.), Case No. 1461, VI these Dec., 911.)

*See also* **AGENTS.**

**U.****UNABSORBED OVERHEAD EXPENSES.****UNAMORTIZED FACILITIES.**

*See* **AMORTIZATION.**

**UNLIQUIDATED DAMAGES.**

*See* **JURISDICTION.**

**V.****VAGUE AGREEMENT.**

*See* **CONTRACTS, WHAT CONSTITUTES.**

**W.****WAIVER.**

Where the purchase orders called for deliveries within 30 days and deliveries were delayed by failure of railroads to furnish cars, requests by the Government for deliveries and acceptance thereof is a waiver of such delays. (Carlisle Commission Co., Case No. 2428, VI these Dec., 334.)

Where claimant contracted to deliver steel at a specified date the Government waived its rights as to the time of delivery by accepting the steel on a later date. (Kansas City Structural Steel Co., Case No. 2684, VI these Dec., 1002.)

**WAIVER—Continued.**

Where a subcontractor received a Government requisition containing a provision that confirmation and payment would be made by the prime contractor, the Government obligated itself to protect the subcontractor against loss suffered by it on account of failure of the prime contractor to confirm the order. (Levy Overall Co., Case No. 1548, VI these Dec., 728.)

**WAGES BELOW STANDARD.**

*See* CONTRACTS, CONSTRUCTION.

**WARRANTY.**

Where the contractor did not terminate the contract, but proceeded to manufacture the clothing out of the materials finally furnished by the Government, such action did not necessarily constitute a waiver of damages arising from the Government's default. Where the contractor continuously protested against the delay, there was no waiver merely because the protests showed a misconception of the rights of the contractor. (Phillip Carey Co., Case No. 1491, VI these Dec., 389.)

**WORK, ADDITIONAL.**

*See* CONTRACTS, IMPLIED.

**WRITTEN CONTRACT.**

*See* CONTRACTS, WRITTEN.

















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